Neutral Citation Number: [2008] EWHC 3043 (Comm)

Case No: 2007-1566

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2008

Before :

THE HON MR JUSTICE GROSS

- -

Between :

CAVELL USA Inc (1)	**Claimant**
And	
Kenneth Edward Randall (2)	
- and -	
SEATON INSURANCE COMPANY (1)	**Defendant**
And	
Stonewall Insurance Company (2)	

- -
- -

Stephen Hofmeyr QC & Philippa Hopkins (instructed by **Berwin Leighton Paisner LLP**) for the **Claimants**
Michael Swainston QC & Richard Hill (instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing dates: 6th October – 9th October 2008

- -

Judgment

The Hon Mr Justice Gross

INTRODUCTION

1. This has been the trial of preliminary issues, ordered by Flaux J, on the 23rd May, 2008 ("the Preliminary Issues"). In very broad terms, this litigation as a whole originates in disputes arising out of the management of various insurance companies in run-off. In the event, the parties agreed a wide-ranging release of claims – but with an exception or "carve-out" for "fraud" on the part of the former managers, related companies and individuals. The Preliminary Issues with which the Court is currently concerned go to the questions: (1) whether the parties have agreed to submit all their disputes, including claims in fraud to the exclusive jurisdiction of the English Court; (2) (i) what is meant by fraud; and (ii) whether claims advanced in the New York

Court are claims in fraud, within the meaning of the carve-out. To explain all this, it is necessary to introduce the parties and say something of the history of the matter.

2. The First Claimant ("Cavell US"), formerly known as Ken Randall America Inc. and before that as Eastgate Inc., is a Delaware corporation which provides claims handling and management services to insurance companies in run-off. Since November 2000, its majority shareholder has been Randall and Quilter Insurance Holdings plc("RQIH"), whose Chief Executive Officer, Chairman and majority shareholder is the Second Claimant ("Mr. Randall"). Mr. Randall is also Chairman of the Board of Directors of Cavell US.

3. The Defendants ("Seaton" – formerly, Unigard Security Insurance Company - and "Stonewall") are insurance companies, now domiciled in Rhode Island. They have been in run-off for a number of years.

4. Dukes Place Holdings LP ("Dukes Place") is a Bermuda limited partnership, established in 1996 by a New York investment house, Greenwich Street Capital Partners LP, later GSC Partners LP ("GSC"). Through Dukes Place, GSC invested in a number of insurance companies in run-off, including Seaton and Stonewall. Seaton was acquired by Dukes Place in 1999 and Stonewall in 2000.

5. On the 31st March, 1999, Cavell US (then Eastgate Inc.) and Seaton entered into an agreement ("the Seaton Administration Agreement") by which Cavell US agreed to provide administration and management services for Seaton. Cavell US and Stonewall entered into a similar agreement on the 29th September, 2000 ("the Stonewall Administration Agreement"). RQIH companies also managed other companies in the Dukes Place portfolio, including two English insurance companies, Cavell Insurance Company Ltd. ("CIC") and Unione Italiana Reinsurance Company (UK) Ltd. ("Unione").

6. Following the inception of the Seaton and Stonewall Administration Agreements, in 1999 and 2000 respectively, Cavell US managed the run-off of Seaton and Stonewall until 2006. Various disputes arose towards the end of that period between Dukes Place and RQIH (and the Claimants) as to the conduct of run-off.

7. At about the same time, certainly from August 2005 if not before, negotiations were proceeding between Dukes Place and the Castlewood/Enstar group of companies ("Castlewood" and "Enstar" respectively) for the purchase of, or of a shareholding in, Seaton and Stonewall. The then Chief Executive Officer of Castlewood and now of Enstar, following a merger in early 2007 between Enstar and Castlewood, was Mr. Dominic Silvester ("Mr. Silvester"). As will be seen in due course, it was an integral part of all Castlewood/Enstar proposals for the purchase of Seaton and Stonewall (or a stake in those companies) that Cavell should be replaced by Castlewood as run-off manager.

8. Against the background of a pronounced souring of the relationship between Dukes Place and RQIH and the emergence of the Castlewood/Enstar interest in Seaton and Stonewall, an agreement, described as a Term Sheet, was entered into between Dukes Place and RQIH (and their respective entities), signed by the parties between the 17th and 22nd February, 2006 ("the Term Sheet").

9. It is convenient at once to set out the Preamble, together with cll. 13 and 29, of the Term Sheet:

> " This Term Sheet documents the agreement between the parties identified as Parties below with respect to the orderly termination of the contractual and other commercial relationships amongst them and the orderly handover by Cavell Management Services Limited ('Cavell UK') and Cavell USA Inc. ('Cavell USA') of run-off management and other services in connection with Seaton Insurance Company ('Seaton'), Stonewall Insurance Company ('Stonewall'), Unione Italiana (UK) Reinsurance Company Limited ('Unione') and Cavell Insurance Company Limited ('CIC') having regard to the regulatory responsibilities of Dukes Place (as defined below) and Randall (as defined below) and the interests of the policyholders of Seaton, Stonewall, Unione and CIC.
>
> **Parties**
>
> (1) Dukes Place Holdings LP for itself and on behalf of its partners, shareholders, directors, officers, subsidiaries, associated companies and affiliates (including but without limiting the generality of the foregoing Seaton, Stonewall, Unione and CIC)('Dukes Place');
>
> (2) Randall & Quilter Investment Holdings Limited (for itself and on behalf of its partners, shareholders, directors, officers, subsidiaries, associated companies and affiliates (including but without limiting the generality of the foregoing Cavell USA and Cavell UK)('Randall');
>
> ……
>
> 13. Dukes Place hereby releases and forever discharges Randall of and from all actions, causes of action, suits, claims and demands whatsoever, whether at law or equity, whether known or unknown, suspected or unsuspected, disclosed or undisclosed, fixed or contingent, accrued or unaccrued, asserted or unasserted, which Dukes Place ever had, now has or hereafter can, shall or may have against Randall for, upon, or by reason of any matter, cause or thing whatsoever arising out of or in connection with any business, commercial, contractual or other arrangements between or involving either of them as at the date of this Term Sheet, save (i) in respect of any obligations expressly set out in this Term Sheet, (ii) in respect of any actions, causes of action, suits, claims, and demands arising from any breach by Randall of any provision of this Term Sheet, and (iii) in the case of fraud on the part of Randall. This release will not inure to the benefit of any third party…..

> 29. This Term Sheet shall be governed by and construed in accordance with English law and the parties submit to the exclusive jurisdiction of the English Courts."

10. It may readily be seen that cl.13 provided for a widely drafted "release" from actions, causes of action, suits, claims and demands (for shorthand, "claims"), but with a "carve-out" from the release for the matters itemised (i) – (iii) – with "fraud on the part of Randall" constituting item (iii).

11. Despite the Term Sheet, various disputes continued in 2006 and 2007, resulting, *inter alia*, in the commencement and pursuit of arbitration proceedings in the USA between Seaton and Stonewall and their re-insurers, National Indemnity Company ("NICO"), together with litigation between the present parties both in New York and before this Court. The history of these proceedings is, if I may say so, summarised with clarity by Flaux J in his Judgment of the 11th April, 2008 ("the 11th April Judgment") and need not be repeated at any length here.

12. Suffice to say:

    i) On the 6th August, 2007, Seaton and Stonewall commenced proceedings against Cavell US and Mr. Randall personally in the United States District Court for the Southern District of New York, alleging what is said to be fraud under New York law ("the New York proceedings"). In particular and as in due course formulated in the First Amended Complaint lodged by Seaton and Stonewall on the 28th December, 2007 ("the First Amended Complaint"), the allegations focus on the delegation by Cavell US (then Ken Randall America Inc) of claims handling for Seaton and Stonewall to their re-insurers, NICO, pursuant to a Collaboration Agreement dated 8th August, 2001 ("the Collaboration Agreement"). In a nutshell, at the heart of the First Amended Complaint, is the allegation that Cavell US and Mr. Randall "fraudulently" subordinated the interests of Seaton and Stonewall to those of NICO by entering into, operating and concealing the entry into and operation of, the Collaboration Agreement.

    ii) On the 19th October, 2007, the Claimants issued a Motion to Dismiss the New York proceedings on the ground (amongst others) of lack of jurisdiction.

    iii) On the 20th November, 2007, the Claimants commenced these proceedings before this Court. By their Claim Form, the Claimants seek, *inter alia*, the following relief:

> "(1) A declaration that all of the claims advanced by the Defendants ….[in the New York proceedings] ….have been fully compromised and/or released pursuant to clause 13 of the Terms Sheet…..
>
> (2) A declaration that, by virtue of clause 13 of the Term Sheet, alternatively in any event, the Claimants have no liability to the Defendants in respect of the claims ….[in the New York proceedings]…..

> (3) Damages for breaching the Term Sheet by:
>
> (a) The Defendants causing two US Arbitration Panels hearing disputes between them and ….[NICO]….to issue a series of document and deposition subpoenas against the Claimants……('the subpoenas');
>
> (b) The First Defendant filing a motion for injunctive relief with the US District Court for the District of Connecticut and obtaining an order partially enforcing the Claimants' compliance with the subpoenas;
>
> (c) The Defendants bringing the …..[New York proceedings]… against the Claimants."

iv) On the 4th March, 2008, these proceedings were stayed pursuant to an order of Field J (without a hearing). However, that Order was set aside and a renewed oral application for a stay was dismissed by Flaux J on the 11th April, 2008, for the reasons set out in the 11th April Judgment, upon which it is unnecessary to dwell.

v) On the 14th May, 2008, the Claimants' Motion to Dismiss was granted, so that – subject to an appeal lodged by the Defendants – the New York proceedings have effectively been struck out.

13. On the 23rd May, 2008, Flaux J ordered the trial of the Preliminary Issues, in the following terms:

> "A. Whether, on a proper construction of the Term Sheet documenting the agreement between Dukes Place Holdings LP and Randall & Quilter Investment Holdings Limited and signed in February 2006 ('the Term Sheet') and in particular clause 29 thereof, the parties have agreed to submit all disputes (including claims in fraud against Randall (as that phrase is used in the Term Sheet)) to the exclusive jurisdiction of the English Courts.
>
> B. Whether, on a proper construction of clause 13 of the Term Sheet, the claims advanced by the Defendants in the First Amended Complaint in the US District Court for the Southern District of New York ('the First Amended Complaint') are claims in fraud within the meaning of that clause."

14. In summary, the Claimants invite the following answers to these issues:

i) "Yes" to Issue A; any proceedings brought other than in this Court are in breach of the Term Sheet.

ii) Issue B does not arise but, if it does, "no"; the claims in question are not claims in fraud and have therefore been compromised by clause 13 of the Term Sheet.

15. For their part, the Defendants invite an answer of "no" to Issue A and "yes" to Issue B.

16. For practical purposes, as seen when the argument was developed before me, Issue B can be divided logically into two parts as follows:

    i) What is meant by the expression "claims in fraud" in clause 13 of the Term Sheet? ("Issue B(1)");

    ii) Are the claims in the First Amended Complaint such claims? ("Issue B(2)").

    As to Issue B(1), the Claimants submitted that "fraud" meant "deceit", as in the English law tort of deceit and no more. For their part, the Defendants contended that "fraud" in cl.13 included but was not confined to "deceit" and, in particular, included (at the least) "dishonest breach of fiduciary duty". As to Issue B(2), the Claimants submitted that it did not arise; but if it did, then the answer was "no". The Defendants invited an answer of "yes" to Issue B(2).

17. To complete the context, it is next necessary to set out certain of the terms of (1) the Seaton and Stonewall reinsurance agreements with NICO (2) the Seaton and Stonewall Administration Agreements and (3) the Collaboration Agreement.

18. The reason for doing so is this. In considering (so far as it is for this Court to enter upon this issue) the charge of "fraud" advanced by Seaton and Stonewall in the First Amended Complaint against Cavell US and Mr. Randall, arising out of the entry into, operation and alleged concealment of, the Collaboration Agreement, it will be relevant to keep in mind the terms and conditions of both (1) the Seaton and Stonewall reinsurance agreements and (2) the Seaton and Stonewall Administration Agreements. The Defendants' stance is that all such terms and conditions are nothing to the point and that, in any event, the Claimants concealed the Collaboration Agreement and/or its terms from them. The Claimants deny that the Collaboration Agreement was concealed from the Defendants and submit that in the light of the framework provided by the reinsurance agreements and the Administration Agreements, there was nothing remarkable, still less fraudulent, about the Collaboration Agreement – which in any event involved no more than a delegation, as permitted by the Administration Agreements, of a part only of the services they were obliged to provide.

19. I turn to the various agreements. By an Aggregate Retrocession of Loss Portfolio Agreement No. RA 1321, dated 20th November, 1998 ("the reinsurance") and as amended, NICO reinsured Seaton (as the reinsured in due course became), on the terms and conditions set out therein. The reinsurance provided, so far as material, as follows:

> "Article 2. Aggregate Limit
>
> Reinsurer hereby agrees to reimburse the Reinsured for Ultimate Net Loss paid by the Reinsured up to US$327,000,000…..
>
> Article 4. Definitions.

> A.……The Reinsured shall be the sole judge as to what constitutes a claim or loss covered by the Insurance Policies/ Reinsurance Contract reinsured under this Retrocession and as to the Reinsured's liability thereunder and as to the amount or amounts which it shall be proper for the Reinsured to pay thereunder, and the Reinsurer shall be bound by the reasonable, good faith judgment of the Reinsured as to the liability and obligation of the Reinsured under the Insurance Policies/Reinsurance Contracts reinsured under this Retrocession, subject to the terms, exclusions and conditions hereof…..
>
> H. Whenever used in this Retrocession, the term 'Claims Servicer' shall mean Eastgate Group Limited, or any wholly-owned affiliate or subsidiary thereof, or such other person as Reinsurer approves in writing to manage Underlying Claims on behalf of Reinsured.
>
> Article 6. Premium
>
> As the consideration for the rights and obligations set forth in this Retrocession, Reinsurer agrees to accept and the Reinsured agrees to pay a premium of US$191,000,000….
>
> Article 10. Warranties
>
> Reinsured warrants and represents that it will not voluntarily undertake any material change in corporate structure, administrative practices in respect of the Insurance Policies/Reinsured Contracts which are reinsured under this Retrocession or its domicile, without prior written consent of the Reinsurer which consent will not be unreasonably withheld or delayed.
>
> Article 11. Conditions
>
> A. Reinsurer shall have the right to associate in the adjustment of all Underlying Claims.
>
> B. In addition to the Reinsurer's general right to associate as set forth in A. above, the Reinsurer's approval shall be obtained by the Reinsured prior to committing to the payment and/or settlement of (1) any gross claim settlements or other payments covered by this Retrocession in excess of US$ 250,000; (2) any payments not in settlement of specific claims, including insurance policy buy-backs return premiums or commutations of assumed reinsurance obligations, in excess of US$ 250,000; and (3) any commutations or assignments of ceded reinsurance regardless of value. With respect to items (1) and (2) herein, Reinsurer's approval shall not be unreasonably withheld or delayed.

> C. No person may serve as Claims Servicer or otherwise manage the Underlying Claims other than Eastgate Group Limited, or any wholly-owned affiliate or subsidiary thereof, without the prior written consent of Reinsurer.
>
> In the event that, on or after the fifth anniversary of the Effective Date, Dukes Place Holdings LP sells 50% or more of the Voting Securities of Reinsured to any other person or persons, then Reinsurer shall have the right to become the Claims Servicer until this Retrocession is exhausted under the same terms and conditions as Eastgate Group Limited……
>
> Article 18. Standard of care
>
> In undertaking the obligations and responsibilities described herein, the Reinsured and Claims Servicer will have a fiduciary duty to act in utmost good faith to the interests of Reinsurer. "

20. On the 1st May, 2000, Stonewall entered into a similar reinsurance agreement with NICO.

21. As already observed, by the Seaton Administration Agreement, Cavell US (then "Eastgate") agreed to provide administration and management services for Seaton (then Unigard Security Insurance Company, "the Company"). The Seaton Administration Agreement provided, in so far as here material, as follows:

> " 1. Interpretation
>
> 'Company Representative' means the individual notified in writing by the Company to Eastgate from time to time as being authorised to give instructions to Eastgate, the first such individual being named in Schedule 2;
>
> 'Services' means the services provided by Eastgate specified in Schedule 1;
>
> 2. Provision of services
>
> 2.1 The Company appoints and authorises Eastgate from the Effective Date to provide the Services in respect of the Business. Eastgate shall perform the Services with reasonable care and skill in a professional and efficient manner.
>
> 2.2 …….Eastgate warrants that it has read the Reinsurance Agreements in their entirety, that the Reinsurance Agreements create various rights and obligations with respect to the Run-Off Business between the Company on the one hand, and National Indemnity Company ('NIC'), on the other, and that Eastgate will at all times cause the services to be performed in a manner consistent with the Company's rights and obligations under the Reinsurance Agreements.

2.3 Eastgate will provide a representative of NIC with full time access to the Company's offices and records and to allow such representative to monitor the payment of claims and to assist Eastgate and the Company in the settlement of such claims.

6. Post-termination

6.6 For the avoidance of doubt, the provisions of this clause 6 and clauses 3.2, 7, 10, 11, 15.6 and 15.7 shall survive the termination of this Agreement and continue in full force and effect.

8. Assignment and delegation

8.1 Neither party shall assign or deal in any other manner with any of their rights or obligations under this Agreement without the prior written consent of the other, such consent not to be unreasonably withheld or delayed, provided that, subject to clause 10.2, Eastgate shall have the authority to delegate to any person such functions as it deems necessary for the performance of its obligations under this Agreement.

10. Indemnification and Limitation of Liability

10.2 Eastgate shall indemnify the Company against any liability which the Company may reasonably incur to the extent such liability has been finally adjudicated by a court of competent jurisdiction to have resulted from …..(iii) any material breach of this Agreement by gross negligence or wilful misconduct attributable to any consultants, independent contractors or any third party engaged by Eastgate under clause 8 hereof.

14. Further assurance and good faith

14.1 Each of the parties agrees with the other that it will at all times take all steps so as to ensure that the provisions that are to be performed by it are properly performed in good faith.

15. General

15.1 This Agreement sets out the entire understanding of the parties with respect to the matters with which it deals….

15.2 Each party acknowledges that it has not relied upon or been induced to enter into this Agreement by any representation other than a representation expressly set out in this Agreement and neither party shall be liable to the other in equity, contract, tort or in any other way for any representation not expressly set out in this Agreement.

> 15.6 This Agreement shall be governed by and construed in accordance with New York law without reference to that State's law concerning conflicts of law, and any dispute arising in connection with this Agreement is subject to the non-exclusive jurisdiction of the New York courts.
>
> SCHEDULE 1
>
> The Services
>
> 1. Processing and accounting services….
> 2. Management services….
> 3. Claims handling services…
> 4. Claims settlement/underwriting authorities….
> 5. Commutations….
> 6. Reports to the Company….
> 7. Treasury and cash management functions…
> 8. Corporate functions….
>
> SCHEDULE 2
>
> The Company Representative
>
> The Company Representative shall be R.L. Barclay…."

22. Cavell US and Stonewall entered into a similar agreement on the 29th September, 2000 ("the Stonewall Administration Agreement"). It is, however, to be noted that this agreement, although also governed by New York law, provided for dispute resolution by way of New York arbitration rather than the New York Court.

23. Reference has already been made to the Collaboration Agreement, entered into between Cavell US (then Ken Randall America Inc) and NICO. The preamble to this agreement began by making reference to the Seaton and Stonewall reinsurances, together with the Seaton and Stonewall Administration Agreements and the powers of delegation therein. The Collaboration Agreement continued, insofar as presently material, as follows:

> " WHEREAS
>
> Collaboration Agreement
>
> (G) NIC and Randall America now wish to collaborate, on the terms and subject to the conditions of this Agreement with the intent that (i) NIC will be responsible for the management of all Schedule 4 Services (as herein defined) in relation to ….Seaton

and Stonewall and (ii) Randall America will provide all Schedule 1 Services (as herein defined), which are required to be performed by NIC pursuant to the Administration Services Agreement. For the avoidance of doubt, Randall America will continue to provide all services other than claims handling which it is obliged to provide pursuant to the Seaton Administration Agreement and the Stonewall Administration Agreement.

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, the following definitions shall have the following meanings:

'Schedule 1 Services' means the services to be provided by Randall America as set out in Schedule 1

'Schedule 4 Services' means the services for which NIC is to assume responsibility as identified in Schedule 4

3. RESPONSIBILITY FOR CLAIMS HANDLING IN RELATION TO SEATON AND STONEWALL

3.1 …..Randall America hereby delegates to NIC and NIC accepts responsibility for the management of claims in respect of Seaton and Stonewall and NIC undertakes to provide the Schedule 4 Services on Randall America's behalf. In particular, Randall America authorises and requires NIC to direct the Claims Handling Staff in the performance of their duties.

3.3 In carrying out its obligations under Clause 3.1 above, NIC shall perform to the professional standards reasonably to be expected from a professional provider of an equivalent service.

SCHEDULE 1

Schedule 1 Services

1. Information Technology…..

2. Reporting and Accounting

3. Reinsurance Processing, Billing and Collections

4. Regulatory Compliance and Reporting

5. Corporate Services….

6. Maintenance of Non-Claims Records

SCHEDULE 4

> Schedule 4 Services
>
> A. Seaton
>
> All such services as are set out in paragraphs 3 and 4 of Schedule 1 of the Seaton Administration Agreement, together with such assistance as is required to enable Randall America to comply with its obligations under paragraphs 5 and 6 thereof.
>
> B. Stonewall
>
> All such services as are set out in paragraphs 3 and 4 of Schedule 1 of the Stonewall Administration Agreement, together with such assistance as is required to enable Randall America to comply with its obligations under paragraphs 5 and 6 thereof. "

24. Although the Preliminary Issues related to the construction of the Term Sheet, I heard oral evidence of fact; the Claimants called Mr. Randall and Ms. Skoyles (at the time in question, the in-house counsel of RQIH); the Defendants called Mr. Silvester. I shall return to this evidence and its proper scope.

25. Expert evidence of New York law was also adduced, the Claimants relying on Mr. Grais and the Defendants on Mr. Sofaer. In the light of (1) the large measure of common ground between the experts, as seen from their Joint Memorandum of the 25th September, 2008 ("the Joint Memorandum") and (2) the relatively narrow confines within which issues of New York law were relevant, the parties sensibly agreed that it was unnecessary to call the experts to give oral evidence. Instead the (initial) reports of Mr. Grais and Mr. Sofaer, together with the Joint Memorandum, were treated as forming part of the evidence in the case, upon which the parties were at liberty to base their submissions.

26. I should record that I was most grateful to Mr. Hofmeyr QC, who represented the Claimants and Mr. Swainston QC, who represented the Defendants and their respective teams, for the quality of their submissions, written and oral.

PRELIMINARY ISSUE A

27. *Common ground:* I come to Preliminary Issue A and take as my starting point – perhaps ironically in such hard fought litigation – important matters of common ground, bearing on both Preliminary Issues.

    i) The Term Sheet is a contract governed by and construed in accordance with English law and, at least as to disputes arising out of or under the Term Sheet, subject to the jurisdiction of this Court. It follows that the meaning of "fraud" in cl.13 is a question to be determined as a matter of English law by this Court.

    ii) The Defendants disclaimed any suggestion that "fraud" in cl.13 of the Term Sheet meant any claim which would constitute fraud under the law governing the antecedent transaction. So the mere fact, for example, that a claim of fraud

arose out of the Seaton Administration Agreement and would be characterised as fraud by New York law (the law governing the Seaton Administration Agreement), would not mean that the claim constituted "fraud" for the purpose of cl.13 of the Term Sheet.

iii) Whatever the true construction of cl. 29 of the Term Sheet, it did not displace the governing law of the antecedent agreements. The Claimants made plain that their case was confined to the Term Sheet legislating for exclusive English *jurisdiction* for any surviving claims, regardless of any jurisdiction provisions in any antecedent agreements, while leaving the *governing law* of such antecedent agreements unaffected.

iv) It follows on both the Claimants' and Defendants' cases, that, for a claim to constitute "fraud" for the purpose of the cl. 13 (iii) "carve-out", there is (what might be termed) a "double actionability" test to be satisfied. The claim must constitute "fraud" both on the true construction of the Term Sheet, as construed in accordance with English law and as a matter of the governing law of the antecedent transaction.

v) Again, whatever the true construction of cl. 29, this Court would have a "policing" role in any claims advanced purportedly pursuant to the cl. 13 carve-out for fraud. This Court would, on any view, be required to determine, in the case of dispute, whether a particular claim is or is not a claim in fraud and so outwith or within the release contained in cl.13. The critical difference between the parties was that, on the Claimants' case, this Court would be dealing, in addition, with the substance of any surviving claim; whereas, on the Defendants' case, determination of the substance of any claims would rest with some other court or tribunal.

vi) It was not for this Court to adjudicate upon the merits of the "fraud" claims advanced in the First Amended Complaint; on any view, a determination of that nature was not encompassed within the scope of the Preliminary Issues. I am, however, at once bound to observe that this sensible matter of common ground – plainly well founded – did not appear to discourage either legal team from straying (with some enthusiasm) into the merits of those claims. The suggested justification was that such merits went to the matrix of the Term Sheet – a matter to which I shall return, later.

28. *The rival cases:* In summary, Mr. Hofmeyr QC, for the Claimants, developed his submissions on Preliminary Issue A as follows.

i) The wording of cl. 29 of the Term Sheet, forming part (as it did) of a contract intended to achieve an "orderly termination" of the parties' relationships, was of a sufficient width to cover all disputes, including claims in "fraud" against Randall. The Term Sheet was a "divorce settlement". The parties had chosen the English Court as a one-stop tribunal for the adjudication of all disputes arising out of the termination of their commercial relationship and which were left unresolved by the Term Sheet.

ii) If need be, there was a presumption that, in a jurisdiction clause in an international commercial contract, such as cl. 29 of the Term Sheet, the parties

had intended to opt for one-stop determination of all their disputes: see, *Fiona Trust v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep. 254. The decision in *Satyam Computer Services v Upaid Systems* [2008] EWHC 31 (Comm); [2008] EWCA Civ 487, was clearly distinguishable, based on very different wording.

iii) The prospect (already adverted to) of the English Court "policing" the permissible ambit of a claim in fraud, while another court or tribunal in some other jurisdiction determined the substance of the claim, gave rise to a "judicial nightmare"; see: *Ashville Investments v Elmer* [1989] QB 488; *Continental Bank v Aeakos* [1994] 1 WLR 588. The parties could not, realistically, have intended to produce such an outcome.

iv) The fact that a claim was carved-out from the general release contained in cl. 13 could not (at least by itself) mean that it was not subject to the exclusive jurisdiction provision found in cl. 29 of the Term Sheet. Given that all claims were released save for those preserved in the carve-outs contained in cl. 13 (i) – (iii), were it otherwise, there would be no claims to which cl. 29 could apply. If, on the other hand, cl. 29 did apply to the claims preserved in the carve-outs contained in cl. 13 (i) and (ii), there was no basis for treating the fraud carve-out (cl. 13(iii)) differently. The Term Sheet had moved the focus of inquiry away from the antecedent contracts and such jurisdiction provisions as they contained; instead, as it was put in the Claimants' skeleton argument, the Term Sheet had become "…the lens through which any continuing obligations had to be viewed, whatever their original source might have been".

v) Relying on *The "Karen Oltmann"* [1976] 2 Lloyd's Rep. 708, the parties, in negotiating the Term Sheet, had given their own dictionary meaning to cl. 29: namely, that the English Court would determine any claims in fraud against "Randall". In essence, this submission turned on the toings and froings between the parties as drafts of the proposed Term Sheet were exchanged. The high point of this submission was the contention that in a telephone conversation (or conversations) on or about the 14th February, 2006, Mr. Randall had said to Mr. Silvester that he was only prepared to agree to the cl. 13 carve-outs from what would otherwise have been an unqualified release on the basis that he enjoyed the protection of this Court, applying English law, determining what allegations were "fraud". Mr. Silvester, it was said, had orally agreed that that was what the draft wording provided, so that Mr. Randall had the protection he was seeking. (For completeness, I should record Mr. Hofmeyr's acceptance that an estoppel case, hinted at in the Claimants' opening skeleton argument, fell outside the terms of the Preliminary Issues.)

vi) Finally, reliance was placed on a deletion. In some earlier drafts of the Term Sheet, the jurisdiction provision had included the wording "in connection with any dispute hereunder", so narrowing its scope. That wording had been deleted, indeed by those advising Castlewood/ Dukes Place. For this reason as well, cl. 29 was not confined to disputes arising under or out of the Term Sheet.

29. Mr. Swainston QC, for the Defendants, said this as to Preliminary Issue A:

i) The carve-out in cl. 13(iii) excluded fraud claims from the Term Sheet; they were not brought back in by the jurisdiction provisions in cl. 29.

ii) The claims in fraud which Seaton and Stonewall sought to pursue against Cavell and Mr. Randall arose under or out of the Seaton and Stonewall Administration Agreements and were governed by such jurisdiction and arbitration provisions as were contained in those agreements – in the event, the New York court and New York arbitration. Clear words would have been needed to displace those jurisdiction agreements. The language of cl. 29 of the Term Sheet was not apt to do so. It was common ground that the governing law provisions of the antecedent agreements had not been displaced by the Term Sheet; nor had the jurisdiction provisions. As colourfully expressed in the Defendants' written closing submissions: "The Claimants' efforts to cultivate a garden variety law and jurisdiction clause into a triffid capable of gobbling up the jurisdiction clauses in other contracts are hopeless."

iii) Given that the question which arose here was the impact of cl. 29 on jurisdiction provisions contained in antecedent agreements, *Fiona Trust* (*supra*) was not in point; instead, relevant guidance was to be found in *Satyam v Upaid* (*supra*). Here, as there, the jurisdiction provisions of the antecedent agreements continued to apply.

iv) On its true construction, the scope of the jurisdiction wording in cl. 29 was confined to disputes under and arising out of the Term Sheet. That was plain insofar as the clause dealt with governing law; the provisions as to jurisdiction went no wider. This was the natural reading of cl. 29; the words were to be read conjunctively. Claims relating to the fraud carve-out were not within the ambit of the clause. The jurisdiction of this Court was confined to ensuring that only "fraud" claims were brought pursuant to the cl.13(iii) carve-out. The Claimants had exaggerated the difficulties to which this construction could give rise; in any event, as this was what the parties had agreed, unattractiveness (if such there was) was irrelevant.

v) There was nothing in the suggested point based on the *The "Karen Oltmann"* (*supra*). There had been no agreement of the nature alleged; in any event, even if (contrary to the Defendants' case) Mr. Randall's evidence was accepted, it did not go far enough for the Claimants' purposes: it produced nothing more than that the English Court would police the ambit of fraud claims, rather than constitute the forum for determining them. For the sake of clarity, I should indicate that Mr. Swainston, while disputing the Claimants' *Karen Oltmann* case, realistically did not seek to advance one of his own.

vi) Seen in their proper context of the pre-contractual exchanges, the Claimants' reliance on the deletion of the wording "in connection with any dispute hereunder", took the matter no further.

30. *Discussion:* In *ICS Ltd v West Bromwich BS* [1998] 1 WLR 896, at p.912-913, Lord Hoffmann set out a number of principles as to the construction of contractual documents; the first of those principles said this:

> " (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

Manifestly – and as is beyond dispute – this is an objective approach: see, helpfully, *Treitel* (12th ed., 2007), at para. 6-009; *McMeel, "The Construction of Contracts"* (2007), at paras. 1-124 *et seq.* I direct myself accordingly.

31. The exercise is not straightforward. It is the case – from the areas of common ground which I have outlined – that whatever the true construction of cl. 29, there is no question of displacing the governing law of the antecedent agreements. Furthermore, again whatever the true construction of cl. 29, an element of double actionability is involved. Still further, it is common ground that it will fall to the English Court to fulfil a "policing" role, so as, at the least, to determine whether any claims sought to be advanced are properly outside the release and within the cl. 13(iii) carve-out. The task is therefore complex. But all this said, applying the objective approach to the construction of cl. 29 of the Term Sheet, I have reached the clear conclusion that the parties agreed to submit all disputes – including claims for "fraud" against "Randall" – to the exclusive jurisdiction of the English Court. The commercial purpose of the Term Sheet, the language of the clause, the unreasonableness of the consequences inherent in the Defendants' construction and considerations of the Term Sheet as a whole (despite one apparent anomaly, concerning cll. 23 and 24 thereof), all support this conclusion. Authority, so far as relevant provides some support and does not tell against it. My more detailed reasons follow.

32. First – if only to put it to one side - it is, with respect, fallacious to suggest (as the Defendants did) that because "fraud" was carved-out from the release, it was therefore excluded from the Term Sheet. That simply does not follow. The release is not to be equated with the Term Sheet. The carve-outs are very much part of the Term Sheet. No question therefore arises of cl. 29 needing to bring "fraud" back into the Term Sheet.

33. Secondly, it is important to keep well in mind the commercial purpose of the Term Sheet, as underlined in the Preamble. By February 2006, the relationship between Dukes Place and Randall had soured. A variety of contracts and other commercial relationships, originating in different jurisdictions, were involved. The purpose of the Term Sheet was to achieve an "orderly termination" of those relationships and an "orderly handover" of the services hitherto provided by Randall. With this in mind, cl. 13 of the Term Sheet furnished a complete release of all Dukes Place claims (as I have used the expression, for shorthand) against Randall, save only for those covered by the carve-outs contained in cl. 13 (i) – (iii). The management of the "orderly termination" and "orderly handover" was channelled by the parties into this single Term Sheet. Against this background, a provision for all residual disputes to be dealt with in a single jurisdiction, would be consistent with the purpose of reasonable commercial parties in entering into this Term Sheet – whereas it might be thought that the prospect of dispute resolution in a variety of jurisdictions would not be. That is of course not the end of the matter; the parties may inadvertently have failed to accomplish their purpose. But it furnishes a strong pointer as to how cl. 29 might be

read, at least unless its language, or other considerations, preclude such a construction.

34. Thirdly, the language of cl. 29, so far as it deals with jurisdiction ("and the parties submit to the exclusive jurisdiction of the English Courts") is wide rather than restricted. There is nothing in that wording to exclude claims in fraud, preserved by the cl. 13(iii) carve-out. While there are limits on the weight of grammatical points – see Lord Hoffmann's fourth principle in *ICS* – I am in any event unable to accept that the language or structure of cl. 29 supports the construction contended for by the Defendants. For my part, I do not read the wording of cl. 29 conjunctively. The fact that in the first part of the clause the governing law of the Term Sheet is given as English law does not mean that the jurisdiction wording which follows the word "and" is to be read as confined to (for example) "in connection with any dispute hereunder". Indeed, in order to do so, it would, be necessary to read some such wording into the clause and I can see no warrant for doing so. Certainly, as a matter of impression I would not read the wording of cl. 29 as restricted in this way, or to "disputes under and arising out of" the Term Sheet, if that construction was said not to extend to fraud claims within cl. 13(iii) - *a fortiori*, when the underlying commercial purpose of the Term Sheet is kept in mind. It may be that this conclusion is reinforced when regard is had to the introduction and subsequent deletion, of the wording "in connection with any dispute hereunder" in the course of negotiations; but I do not rest my conclusion on any argument as to deletions and say no more of that argument.

35. Fourthly, I do regard the prospect of the English Court "policing" the true ambit of "fraud" claims, while another court or arbitration tribunal determined their substance, as a judicial or forensic nightmare. That is so notwithstanding the close affinity and mutual respect between English law and New York law. Such a construction necessarily contemplates the risk of the English Court being called upon to give case management decisions at the commencement of or during the currency of proceedings elsewhere; what, for example, if in the New York Court or in New York arbitration, Seaton or Stonewall sought to introduce some disputed amendment? It is to be remembered that unless a claim is a "fraud" claim, it will have been released under cl.13. Both this Court and the New York Court or tribunal would be placed in a most invidious position. The nature of any such role was illuminated by the detailed submissions presented to me by the parties on the pleadings contained in the First Amended Complaint, should Preliminary Issue B(2) arise. As was apparent before me, this is hard-fought litigation and I would view with dismay the prospect of such a policing role. This is of course not by itself decisive; as Mr. Swainston rightly submitted, if that is what the parties have agreed, then the fact that it is forensically – and, for that matter, commercially – unattractive is neither here nor there. But I would not accede to a construction of the Term Sheet involving such consequences, unless driven to it. I do not think I am. As is often observed, the more unreasonable the consequences, the less likely the construction which produces such results.

36. Fifthly – and generally an instructive test - the conclusion to which I am attracted, namely that surviving claims in "fraud" are subject to the exclusive English jurisdiction clause contained in cl. 29 of the Term Sheet, is supported by and not undermined by a consideration of the Term Sheet as a whole.

i) It will be recollected that RQIH companies had also managed other companies in the Dukes Place group, in particular CIC and Unione. Cll. 1-5 of the Term Sheet dealt with the termination of the CIC arrangements and cll. 6-11 made provision for the termination of the Unione arrangements, in each case together with the obligations resting on Randall pending such termination. It was not in dispute and certainly indisputable that the release contained in cl. 13 applied generally to any claims against Randall arising out of the CIC and Unione management contracts. If so, then in order to ascertain what, if any, continuing obligations rested on Randall in connection with the CIC and Unione management contracts it was necessary, by whatever precise route, to have recourse to cll. 1-5 and 6-11 of the Term Sheet. Any claims in respect of those continuing obligations or arising from any breach of those obligations by Randall, formed the subject of the cl. 13(i) and (ii) carve-outs. To my mind, it could not seriously be contended that a dispute, arising under either cl. 13(i) or (ii), would not be subject to the jurisdiction provisions of cl. 29. If that is right, then the conclusion that a dispute as to the cl. 13(iii) carve-out is subject to the jurisdiction provisions of cl. 29 dovetails well with the scheme of the Term Sheet as a whole.

ii) I come to the somewhat anomalous provisions of Cll. 23 and 24 of the Term Sheet, which provided as follows:

> "23. Dukes Place has already provided a notice of termination effective 31st December 2006 to Renaissance Capital Partners ('RCP') under the terms of its Advisory Agreement. RCP will continue to advise Dukes Place *as per the Advisory Agreement* until that time. Dukes Place will not purchase the 51% of RCP owned by Randall.
>
> 24. Cavell UK's lease of premises at Rose Lane Business Centre in Norwich will continue *as set out therein* including, without limiting the generality of the foregoing, on a rent-free basis until January 2008." (Italics added)

Realistically, in the light of the express italicised wording – and having regard to the decision in *Satyam v Upaid* (*supra*) – Mr. Hofmeyr accepted that the agreement (cl. 23) and the lease (cl. 24) would remain subject to such jurisdiction provisions as they had hitherto contained. These, he said, were stand alone provisions and had no wider bearing on the interpretation of the Term Sheet or, in particular, the meaning to be afforded to cl. 29. Suffice to say that I agree; at the most they constitute a minor exception to the jurisdictional scheme of the Term Sheet; not all commercial agreements are necessarily as tidy as might be wished. At all events, I do not think that cll. 23 and 24 undermine the construction of cl. 29 advocated by Mr. Hofmeyr.

37. Sixthly, observations in *Fiona Trust* (*supra*) and other cases in the same line of authority are, with respect, of powerful persuasive force and point here to the likelihood that reasonable commercial parties would have opted for a one-stop jurisdictional solution. It is of course correct to acknowledge both that *Fiona Trust* concerned an arbitration clause not a jurisdiction clause (the considerations may not always be the same) and was not concerned with jurisdiction agreements in

antecedent agreements. It follows, that the reasoning in *Fiona Trust* and other like authorities cannot simply be transposed into this dispute. It is also the case that questions of construction turn on the agreement(s) to be construed, not on authority dealing with differently worded agreements. Nonetheless, even with such cautions well in mind, the observation of Bingham LJ (as he then was) in *Ashville Investments Ltd v Elmer* (*supra*), at p. 517, has obvious resonance here:

> " I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings."

See, to the same effect, Lord Hope, in *Fiona Trust*, at [31]. If, however, the Defendants are correct in their submissions on this preliminary issue, then that is precisely what the parties would have to be taken as intending. I would be most reluctant to accede to a construction which produced such an outcome.

38. I have not in all this overlooked the decision, both in this Court and in the Court of Appeal, in *Satyam v Upaid* (*supra*). As it seems to me, however, that decision turned on the very different wording of the agreement there in issue. In that case, the Court was concerned with a Settlement Agreement and an Antecedent Assignment Agreement. For present purposes, the relevant contention was that an exclusive English jurisdiction clause in the Settlement Agreement precluded the pursuit of proceedings in Texas; that was indeed the only basis for the argument that Texas was not an appropriate forum and that England was such a forum. The contention failed, both before Flaux J (see, esp. at [87] *et seq*) and the Court of Appeal (see, esp. at [88] – [93]). That it failed was, with respect, unsurprising. The difficulty it faced was that cl. 3.1(b) of the Settlement Agreement provided as follows:

> " ….Further, Satyam confirms all assignments of intellectual property rights to Upaid by it and those assignments executed by Satyam employees as co-inventors of Upaid intellectual property and such assignments will survive and shall be governed by such Assignment agreements…. "

Lawrence Collins LJ expressed the conclusion of the Court of Appeal this way (at [93]):

> "….the judge was plainly right…..Plainly it makes commercial sense for a dispute about the validity of the contract to be determined under an arbitration agreement (or a jurisdiction agreement). Whether a dispute under a different contract is within a jurisdiction agreement depends on the intention of the parties as revealed by the agreement. The effect of cl.3.1(b) is that any claims under the Assignment Agreement are governed by that agreement and not by the Settlement Agreement. Claims under an agreement preserved by the Settlement Agreement do not 'relate' to the Settlement Agreement."

39. Save in one respect (namely, cll. 23 and 24 of the Term Sheet, with which I have already dealt), the Term Sheet contains no clause such as cl. 3.1(b) in the *Satyam* case. The decision in *Satyam* does not therefore assist the argument in the present

case. As already suggested, the intention of the parties here was to channel all surviving disputes into this jurisdiction and, in my judgment, the wording found in cl. 29 of the Term Sheet was of sufficient clarity and width to achieve this purpose. Mr. Swainston argued vigorously and attractively against any such conclusion, deploying the colourful language already referred to and placing much emphasis on the parties' "accrued rights" under the Seaton and Stonewall Administration Agreements. But this involved, with respect, an unwillingness to recognise the full extent to which the parties' relationships and the arrangements for any surviving disputes had been transformed by the Term Sheet.

40. For completeness:

i) Not without significance, the Defendants' argument failed to cater for the fact that *Mr. Randall* was himself a party to the Term Sheet (see para. (2) of the Preamble) – but was not a party to the antecedent Administration Agreements. As it seems to me, there was no basis on which it could be said that the parties to the Term Sheet intended Mr. Randall to be bound by the jurisdiction or arbitration clauses contained in those antecedent agreements. But cl. 29 cannot sensibly be interpreted to have one meaning for Mr. Randall and another for Cavell US.

ii) Both the CIC and Unione management contracts (see above) had themselves contained provisions for English arbitration and English court jurisdiction respectively. It follows that in respect of the cl. 13 (i) and (ii) carve-outs, cl. 29 was apt to override, displace or supersede those antecedent jurisdiction and arbitration provisions. I can see no good reason for treating claims in "fraud", preserved under the cl. 13(iii) carve-out, any differently for jurisdiction purposes.

41. Accordingly, for the reasons so far given, I would answer Preliminary Issue A "*yes*". It is therefore unnecessary to consider how the New York Court might react to an invitation from this Court to revisit its jurisdiction – which (as matters stand) it has declined to exercise.

42. Having decided this preliminary issue in the Claimants' favour, I can deal summarily with the argument, based on *The "Karen Oltmann"*, advanced by Mr. Hofmeyr. I intend no disrespect in not setting out the evidence of Mr. Randall, Ms Skoyles and Mr. Silvester at any length.

i) To my mind, there was nothing even approaching any agreement as to jurisdiction to bring the negotiations within the ambit of *The "Karen Oltmann"* doctrine. The pre-contractual negotiations contained, unsurprisingly, attempts by both parties to improve the terms of the bargain into which they were seeking to enter. The only matter that can be said for certain is that Mr. Randall plainly wanted the widest possible release and, equally plainly, Dukes Place was insistent on retaining the fraud carve-out. A number of drafts were exchanged, in which, from time to time proposals as to jurisdiction were advanced – some times not necessarily or apparently in accord with the parties' cases as advanced at this trial. So, for instance, Randall at one stage proposed a Boston arbitration clause and Dukes Place deleted wording ("in connection with any dispute hereunder") which had

narrowed the jurisdiction clause in the previous draft. The picture, on occasions, is one of confusion – and, importantly, it is to be remembered that particular draft clauses need to be seen in the context of the then draft agreement as a whole.

ii) I have no reason to doubt that Mr. Randall made some reference/s in telephone conversations with Mr. Silvester to English law and the English Court; but I readily accept Mr. Silvester's evidence (on this part of the case) that he was not – and plainly was not – the man who was dealing, on the Defendants' part, with drafting questions; anything said by him could not have given rise to a reasonable belief on the part of Mr. Randall that English jurisdiction had been agreed.

iii) Still further, even if the conversation/s between Mr. Randall and Mr. Silvester did encompass all that which was contained in para. 125 of Mr. Randall's witness statement, a matter of which I was not, with respect, persuaded, it would not have gone far enough to make good the case that English jurisdiction had been agreed for determining the substance of any fraud dispute. In this regard, the evidence of Ms. Skoyles, if she will forgive my saying so, could not and did not add anything.

iv) Overall, the Claimants' effort to place reliance on pre-contractual negotiations in this dispute served, if anything, to underline the practical wisdom of the traditional rule in English law, generally excluding such materials.

v) I therefore reject the argument which the Claimants sought to base on *The "Karen Oltmann"*; this conclusion in the Defendants' favour is, however, academic as, for the other reasons already given, I have determined Preliminary Issue A in the Claimants' favour.

PRELIMINARY ISSUE B(1)

43. *(I) The facts:* Given the view I take of this part of the case and bearing in mind that this Issue too involves a point of construction, my summary of the evidence and facts, if unavoidably of some length, will be a great deal shorter than it would otherwise have been. I also, at the outset, reiterate the common ground that it is not for me to determine the merits of the underlying disputes.

44. To recap, the gravamen of the Dukes Place allegation, as pleaded in the First Amended Complaint, is that Randall "fraudulently" subverted the interests of Seaton and Stonewall to those of NICO by entering into, operating and concealing the entry into and operation of the Collaboration Agreement. Randall had ceded control to NICO; it had not acted independently to safeguard the interests of Seaton and Stonewall; it had not fulfilled its "commitment" to run-off the Seaton and Stonewall liabilities "at the lowest cost of indemnity in the shortest timeframe possible". All this had not been disclosed and had been actively concealed from Dukes Place; Randall had fraudulently misrepresented to Seaton and Stonewall that Cavell US was acting in good faith and in furtherance of their best interests.

45. The business context was this. Investors, such as Dukes Place, in insurance companies in run-off would hope to make a profit, by buying at the right price and "liberating"

capital later at a profit. In the meantime, the business of those insurers needed to be run-off. If reinsurance could be obtained at a suitable finite premium and the run-off conducted by way of achieving the lowest settlement of claims in the shortest time, then the investor stood to maximise his profits.

46. As to the provision of run-off management services, at least in a broad sense, Randall and Castlewood were competitors. The evidence, however, suggested that there may have been a difference of emphasis. The Randall *raison d'etre* was or may have been the management itself; whereas Mr. Silvester's account suggested that Castlewood's primary goal was the realisation of a capital gain by buying companies at a discount and selling at a profit, with management being a "by-product" rather than the focus of his approach. In Mr. Silvester's words, his approach was that of a private equity firm. While, in any venture, he would insist on responsibility for and control of management, he would be prepared to sub-contract its performance or parts of it, even to competitors.

47. As is apparent, at least as a matter of theory, there is the potential for tension between those investing in insurance companies in run-off and the reinsurers of those companies. The investors' goal of maximising profits in the shortest possible time may not be shared by reinsurers, who might well see benefit (for perfectly proper reasons of their own) in taking longer over claims settlement. To such extent, if the manager of the run-off is perceived by the investors as preferring the interests of the reinsurers to those of the investors, there is room for dissatisfaction.

48. But theory, as Mr. Randall compellingly explained in his evidence, may be markedly different from practice. The matter could not be considered in "a vacuum". In particular, the existence of appropriate reinsurance arrangements may well be vital to the insurance company in run-off and, indeed, its investors; moreover, such reinsurance may be essential for the purpose of satisfying regulatory requirements.

49. The manager, therefore, may have to take account of existing reinsurance arrangements, which will or may loom large in the conduct of the run-off. The management strategy will necessarily be influenced by the framework of the reinsurance arrangements.

50. Mr. Randall's evidence – supported by Mr. Hofmeyr's submissions as to the true construction of the various agreements - is that this is precisely what happened here. The words "sole judge" in Art. 4A of the reinsurance should not be seized upon in isolation. They were followed (in the same clause) by the words "…subject to the terms, exclusions and conditions hereof…". Art. 11A gave NICO "the right to associate in the adjustment" of underlying claims and Art.11B stipulated for NICO's approval to be obtained prior to insurers' committing to a variety of payments or settlements and prior to entering into any commutations. Admittedly, NICO's approval was not to be unreasonably withheld. Art. 18 of the reinsurance imposed on both the reinsured and, in the event, Randall (as "Claims Servicer"), a "fiduciary duty to act in utmost good faith to the interests of Reinsurer". Manifestly all this was known to Seaton, Stonewall and, hence Dukes Place as a whole.

51. The Seaton and Stonewall Administration Agreements, at least on the Claimants' case and Mr. Randall's account, reflected the importance of the reinsurance and the powerful position held by NICO. For instance, Art. 2.2 of the Seaton Administration

Agreement obliged Cavell US to perform the "Services" "….in a manner consistent with the Company's rights and obligations…" under the reinsurance. Art. 2.3 of that Agreement made provision for a representative of NICO to have access to Seaton's offices and records and "to assist" Cavell US and Seaton in the settlement of claims.

52. According to Mr. Randall, with such considerations in mind and pursuant to the power of delegation contained in Art. 8 of the Administration Agreements, Cavell US entered into the Collaboration Agreement. All that was involved was a *delegation* by Cavell US to NICO of some services which Cavell US was obliged to provide to Seaton and Stonewall; as between Cavell US and Seaton and Stonewall, *responsibility* remained, as before, with Cavell US. There was, said Mr. Randall (in effect), nothing remarkable, still less "fraudulent" about the Collaboration Agreement.

53. On the face of it, the fact that the reinsurance arrangements with NICO imposed constraints on the management of the run-off was recognised by Dukes Place itself, as evidenced by a draft document of 19th June, 2003, containing the following passage:

> "…The settlement of the liabilities of Seaton and Stonewall are in part governed by limitations imposed by Berkshire Hathaway which reinsures the liabilities. This reinsurance protects the capital, but limits strategies to be adopted by Dukes Place to accelerate the run-off."

54. Moreover, again on the Claimants' case and very much part of Mr. Randall's evidence, there was copious disclosure of the Collaboration Agreement, so striking at the heart of the Dukes Place allegations of fraud. Putting Mr. Randall's assertions to one side, the documentary material before me included the following examples:

i) A staff notice, dated 8th August, 2001, announcing entry into the Collaboration Agreement and not readily reconcilable with any intention to conceal its existence;

ii) On the 29th May, 2002, the Collaboration Agreement was expressly noted and approved by the Cavell US Board; according to the Minutes, one of the directors present was Mr. Mayur Patel, GSC's London representative;

iii) On the 12th December, 2002, Mr. Robert Barclay, Director and President of Seaton and Stonewall (indeed, the Seaton "Company Representative" for the purposes of the Seaton Administration Agreement) and Managing Director of Dukes Place, sent a fax to NICO. The context was a proposed change of domicile for Seaton and Stonewall, to Rhode Island. Amongst a number of matters dealt with, Mr. Barclay said this:

> " …We recognise that any acceleration of settlement of the liabilities could prejudice the legitimate interests of NICO, and without NICO's consent, would be likely to breach the terms of the Retrocession Agreements. We have no wish to breach our contractual obligations nor to damage our relations with NICO to the detriment of our current working relationship and future prospects for collaboration on new transactions….

> For the avoidance of doubt we confirm that we shall not initiate any plans for the winding up of Seaton or Stonewall upon a solvent basis which have the effect of increasing the liabilities or accelerating the settlement of the liabilities of Seaton or Stonewall, the consequence of which would result in increasing recoveries or accelerating the collection of recoveries from NICO under the Retrocession Agreements, without first securing the consent and support of NICO."

Understandably, the Claimants relied on this passage as supporting Mr. Randall's evidence that the reality of the relationship between Seaton, Stonewall and NICO impacted on the theory of accomplishing the run-off in the shortest possible time. The fax did not, however, end there. It continued as follows:

> " …I also confirm that the re-domiciling of Seaton and Stonewall to Rhode Island will have no impact on how the run-off of the claims of the companies is conducted by Randall America. The work will continue to be done in Boston. There are no plans to make any changes to the current arrangements. If Randall America was to plan to do so, I am sure that *given their contractual relations with NICO for claims handling and other run-off administration,* they would discuss their intentions with NICO. " (Italics added.)

It would appear that the reference to Cavell US's "contractual relations" with NICO must relate to the Collaboration Agreement; certainly the Defendants, before me, made no positive suggestion to the contrary. Mr. Barclay signed the fax as President of Seaton and Stonewall and further indorsed it as Managing Director of Dukes Place. Pausing there, this is, self-evidently, an important communication with considerable apparent ramifications for the Dukes Place charge of concealment of the Collaboration Agreement.

iv) The "Due Diligence Examination" report, prepared by the Rhode Island Department of Business Regulation Insurance Division, dated 26th November, 2003 and dealing with the re-domiciling of Seaton and Stonewall in Rhode Island, referred in terms to the Collaboration Agreement; it would appear that the report was reviewed in draft by both Mr. Patel and Mr. Barclay.

v) In an e-mail exchange with NICO in December, 2004 relating to the handling of a particular claim, Mr. Barclay made express reference to the Collaboration Agreement, saying this (e-mail of 10th December, 2004):

> " Stonewall has a Run-Off Management Agreement with Cavell America within which it is recorded that 'Eastgate (now Cavell America) agrees to administer the Reinsurance Agreement (the agreement between Stonewall and NICO) consistent with the Company's rights and obligations under the Reinsurance Agreement.' Stonewall does not have any run-off management agreement with NICO. The relationship between Cavell America and NICO set out in the Collaboration

> Agreement ….is of no concern to Stonewall which can only look to Cavell America to fulfil its obligations under the Run-Off Management Agreement. The Collaboration Agreement has no effect upon the relationship between Stonewall and NICO which….is governed by the Aggregate Reinsurance Agreement…. "

55. On the face of it, this is a considerable body of material, posing real difficulty for the Defendants should they wish to assert a charge of fraud against Cavell US or Mr. Randall. The history, however, continues in 2005, shedding light both on the negotiations between Castlewood/Enstar and Dukes Place for the purchase of an interest in Seaton and Stonewall and on discussions between Mr. Silvester and Mr. Randall at that time.

56. As previously foreshadowed, the documents recording the negotiations between Castlewood/Enstar and Dukes Place leave little room for doubt that should Castlewood/Enstar come to acquire Seaton and Stonewall or an interest in those companies, then Castlewood would take over the management of the run-off and the arrangements with Randall would be terminated. This is a consistent and integral theme in a proposal document of 11th August, an e-mail of 26th August, a memorandum of 13th September and a revised proposal of 19th September, all in 2005.

57. I come next to an unattractive chapter in Mr. Silvester's evidence, concerning discussions between him and Mr. Randall in London on 14th October and in New York, on 7th November, 2005 ("the 14th October" and "7th November" meetings, respectively). To put this passage in context, first, there was the determination (already summarised) to replace Randall with Castlewood as the run-off manager of Seaton and Stonewall; secondly, it is clear (at least by now) that Mr. Eckert, Chairman and Chief Executive of GSC had strong reservations about Randall. Although he sought to gainsay it in his oral evidence, on the documents I have seen, I have no doubt whatever that Mr. Silvester and his associates did what they could to undermine Randall's position still further with GSC. One example, may be taken from the 13th September, 2005 Memorandum, sent by Castlewood to Mr. Mayur Patel:

> " To avoid providing Randall with a further opportunity to put up obstacles we believe that you need to provide him with a series of decisions already made, not just inform him of 'intentions'. Given his other relationships with Berkshire we need to have Berkshire 'on side' before talking with Randall."

So too, in a Memorandum dated 28th November, 2005 ("the 28th November memorandum"), Mr. Silvester records that "a year or so ago" (i.e., late 2004), he had expressed to GSC his view that their interests "were not aligned" with those of Mr. Randall; he had made a similar observation, he said, to Mr. Eckert, earlier in 2005. When cross examined, Mr. Silvester said that this was a "statement of fact" not criticism of Mr. Randall, going to the different interests of the manager of the run-off and those who had capital tied up in the insurer under run-off. I regret that I am unable to accept that explanation and have reached the conclusion already indicated as to Mr. Silvester and his colleagues stoking the fire of Dukes Place's discontent with

Mr. Randall. Indeed the tone of the 28th November, 2005 memorandum (see esp. para. 2) leaves little doubt in this regard.

58. Mr. Randall, who was aware of a possible sale of Seaton and Stonewall (or of a stake in it) to Enstar but, on the evidence, not previously aware of the antipathy (or the full extent of it) towards him on the part of either GSC or Castlewood/Enstar, expressed an interest in joining forces with Enstar as a proposed purchaser of Seaton and Stonewall. In a Castlewood Memorandum dated 2nd November, 2005 ("the 2nd November memorandum") referring to the 14th October meeting between Mr. Silvester and Mr. Randall, there is the following passage:

> " 2.6 In order to avoid answering questions asked by Randall, DS led Randall believe that the acquisition of Seaton/Stonewall was an Enstar initiative led by JO [John Oros – Executive Chairman of Enstar]."

A Castlewood Memorandum of 7th November ("the 7th November memorandum"), containing the Minutes of the New York meeting between Mr. Silvester and Mr. Randall, said this, amongst other things:

> " The position of Castlewood and Enstar leading into the meeting was that both companies strongly feel that the possibility of joining forces with KR is remote, however, we considered that it was worth discussing the situation with KR as it would inevitably provide Castlewood and Enstar with useful information on the operations of Seaton/Stonewall."

59. Mr. Silvester was pressed on these passages in cross examination. It was put to him that he had been "less than forthright". By the time of these conversations, he knew that there was every intention of terminating Randall's management of Seaton and Stonewall. There was no realistic chance of their working together. He had "led Mr. Randall on" simply to gather information. In his answers, Mr. Silvester resisted these conclusions. First, he had kept an open mind; the chance of Randall being involved was, as expressed, "remote" but not non-existent. Secondly, the fact that Castlewood was to take over the management of the run-off did not (as already explained) on his business model preclude the sub-contracting of specific tasks. Thirdly, the money for the proposed transaction was coming from Enstar not Castlewood. Fourthly, these had been business meetings. Mr. Randall may have made assumptions; it was "not necessarily his obligation" to correct them; it would have been a quite different matter if he had said something which was not true.

60. I listened carefully to Mr. Silvester and have anxiously considered his evidence. I regret that I was wholly unable to accept these answers. It would not be right to put the matter higher than it was put to Mr. Silvester in cross examination. He was less than forthright with Mr. Randall. He knew throughout these discussions that there was no realistic possibility of Randall's continued involvement in the management of the Seaton and Stonewall run-offs, should the Castlewood/ Enstar proposal come to fruition. Indeed a part of his strategy in negotiating with Dukes Place was to ensure that that would be so. He sought to emphasise Enstar and downplay Castlewood's involvement, so as to avoid having to answer awkward questions. He led Mr.

Randall on and pursued these discussions simply or cynically, to elicit such information as he could.

61. But whatever all this says about Mr. Silvester, the fact remains that some information was indeed forthcoming from Mr. Randall – and it is upon that information which Dukes Place (and Castlewood/Enstar) thereafter largely relied in seeking to build their charge of "fraud". Further, whatever view is taken of the conduct by which it was obtained, it is necessary to consider that information on its merits.

62. In broad summary, what emerged from Mr. Randall's comments in the 14th October and 7th November meetings and his oral evidence, was this:

i) There was a "major battle" brewing with NICO, because of conflict between the interests of NICO and Seaton.

ii) He gave as an example of this conflict – much pressed by Mr. Swainston in cross examination and submissions:

> "…a commutation that had been negotiated by Randall which provided for a payment of $10 million from …[NICO]…which would remove approximately $30 million of exposure from Seaton. Randall said that ….[NICO]…exercised their right of refusing a commutation and according to Randall the reason is that such a settlement would cause the …[NICO]…reinsurance to be impacted more quickly than it would if the $30 million was paid out over many years."

iii) Seaton was "in need of proactive management"; such management would result in a "war" with NICO – a war he was ready to wage.

iv) A "strong line" needed to be taken in the future with NICO as to both Seaton and Stonewall, because their (and their shareholders') interests and those of NICO were "not aligned". Seaton and Stonewall were "currently being managed passively" but the time had come to take a more proactive stance.

v) NICO effectively controlled both Seaton and Stonewall because "absolutely nothing gets paid from either Seaton or Stonewall without the express permission" of NICO. It would be foolish to go around NICO because if it did not consent to a claim it would withhold "the reinsurance payment to Seaton and Stonewall".

vi) When NICO looked at a claim which spanned many companies, its priorities were: (1) the effect of a settlement on the Seaton/ Stonewall reinsurances; (2) how the proposed settlement affected the "global" NICO position; (3) the benefit to Seaton and Stonewall themselves.

vii) Mr. Randall acknowledged that Cavell US was paid by both NICO and Dukes Place but said that he gave credit for this so that he was not paid twice.

63. That which I have so far recorded was not in dispute. By contrast and hotly in dispute, was an entry in the 7th November memorandum:

> " KR said that he believed that GSC was aware of the existence of the Collaboration Agreement but not the terms."

In Mr. Silvester's manuscript notes of the 7th November meeting, there is the following entry:

> "Dukes Place are aware of collaboration agreement but not the terms.
>
> The collaboration agreement gave KR power to enter into agreement with Berkshire & to delegate certain functions."

Mr. Silvester said that Mr. Randall did say that Dukes Place was not aware of the terms of the Collaboration Agreement; Mr. Randall denied that he had said this. In fairness to Mr. Randall, Mr. Silvester's next manuscript note is obviously in error; it was not the Collaboration Agreement but the Administration Agreement which gave Randall the power of delegation. Nonetheless and despite the reservations I have already recorded as to Mr. Silvester, I am persuaded that Mr. Randall did say something along the lines of that recorded by Mr. Silvester. There is otherwise no sensible basis for Mr. Silvester having noted it contemporaneously and no or no proper foundation was laid for a conclusion that he simply made it up. What possessed Mr. Randall to say this, the more especially when it is very difficult to make sense of this observation against the background of the documentary examples of disclosure (already set out) of the Collaboration Agreement, is another matter – but one that does not fall to me to resolve.

64. Pausing here, there was a good deal in these answers which could understandably give rise to concern on the part of Randall's principals. If it was right now to take a more aggressive stance with NICO, why had that had not been done before? Could Dukes Place be confident that Randall would do so? Such concern would not have been assuaged by Mr. Randall's answers in his oral evidence (in which he did himself less than justice) to the effect that the "conflict" (if such it be) between Seaton/ Stonewall and NICO was not important until the cover was or was close to being eroded. If conflict there was, that answer will not do. The statement that Dukes Place was not aware of the terms of the Collaboration Agreement, could only have heightened such concerns. Certainly, any pre-disposition to doubt Randall and to remove it from management of the run-off, would not have been diminished. Whether, however, all or any of this provides a foundation for a claim of *fraud* as opposed to a claim for breach of contract or perhaps duty (whether tortious or fiduciary) – and, if so, against which party or parties – is another matter and again not for me to resolve.

65. The relevant history does not quite end there. On the 19th November, 2005, Cavell US dismissed an employee, a Mr. Burns. On the same day, he sent a Memorandum to Mr. Randall ("the Burns memorandum"), which he said he had been working on "for the past few days". The Burns memorandum expressed serious concerns that the NICO day to day operations and claims handling representative (a Mr. Tom Ryan) may have breached "his fiduciary responsibilities" to Stonewall under the reinsurance.

66. The detail of the Burns memorandum perhaps does not matter. What followed were a flurry of investigations and a myriad of charges and counter-charges. Certainly, Dukes Place made full use of both Mr. Randall's observations in the 14th October and

7th November conversations with Mr. Silvester and of the Burns memorandum in pursuing a goal to which it had already for some time been attracted – the removal of Randall. On the 17th January, 2006, the Seaton and Stonewall Administration Agreements were terminated (or purportedly terminated). On the same day, Castlewood (or a subsidiary) acquired interests in both Seaton and Stonewall. On the next day, the 18th January, 2006, Castlewood entered into run-off administration agreements with Seaton and Stonewall.

67. As regards Randall and Dukes Place, against a background of hostility, attention now became focussed on the negotiation of the Term Sheet. Again, for present purposes, a broad sweep will suffice. Further discussions ensued between Mr. Randall and Mr. Silvester. By this time, Mr. Randall appreciated that litigation arising out of the Cavell US management of the run-off of Seaton and Stonewall and the alleged subordination of their interests to those of NICO was a possibility – and that Dukes Place was continuing to investigate the position. For his part, Mr. Randall regarded the complaints as "nonsense" and observed that some three months had gone by since the Burns memorandum.

68. At all events, Mr. Randall sought an unqualified release for "Randall", failing that, a carve-out covering no more than a "finding of fraud". Dukes Place made clear that a carve-out for "fraud" was a "deal breaker". The parties agreed on the carve-out found in cl. 13(iii) of the Term Sheet. In due course, I shall return to this factual history and indicate my conclusions as to its relevance and the assistance which may properly be derived from it.

69. *(II) The Expert evidence:* At this stage, it is appropriate to say something very briefly as to the expert evidence of New York law. From the outset of the hearing, I was troubled as to the relevance of New York law to the disposal of the Preliminary Issues. In the event, I welcomed the agreement of the parties (already recorded) to dispense with oral evidence from the experts. As it seemed to me – and I do not think was much if at all in dispute – evidence of New York law: (1) was irrelevant to Preliminary Issue A; (2) furnished some, limited and essentially background information, relevant to Preliminary Issue B(1); (3) was of some, if still limited, relevance to Preliminary Issue B(2), should that Issue arise. Given these conclusions, it is unnecessary to go beyond a very few passages in the Joint Memorandum.

70. As the experts say in the Joint Memorandum, "fraud" in New York law denotes several different types of conduct and situations:

> " …including actual misrepresentations, omissions where there is a duty to disclose, breaches of fiduciary duty that involve deception, and aiding and abetting another in committing a fraud."

Very properly, the experts underline that the meaning of "fraud" in cl.13 of the Term Sheet is for this Court to determine.

71. The experts agreed that the elements of common law fraud under New York law are as follows:

> " (1) a material misstatement or omission; (2) made with knowledge of its falsity; (3) and with intent to deceive; (4) upon which the plaintiff justifiably relies; and (5) that results in injury."

72. The experts further agreed that:

> " …an omission with intent to defraud where one is under a duty to disclose has the same legal effect under New York law as an affirmative misrepresentation…."

One of the situations in which New York law recognises a duty resting on a party to a commercial transaction to speak is:

> "…where the parties are 'in a fiduciary or confidential relationship with each other…."

73. I come next to the rival cases and my conclusions on this Issue, thus helpfully informed by the experts as to the position under New York law.

74. *(III) The rival cases:* The arguments on this Issue ranged widely. In broad outline, Mr. Hofmeyr said this. In cl. 13, fraud meant "deceit" – "claims which an English court, applying English law, would find constituted the tort of deceit on the part of Randall". The fraud carve-out was an exception to the general release in cl. 13; it was to be narrowly construed. Building on the factual history or matrix, the Defendants' contentions as to the Collaboration Agreement had been well ventilated by the time of entry into the Term Sheet; Mr. Randall for his part, regarded them as "nonsense"; if the carve-out was, without more, intended to encompass those allegations of non-disclosure and concealment, different wording could and would have been employed; this carve-out, however, was restricted, in an English law agreement, to "fraud".

75. The Claimants accepted (1) that "deceit" (of course) encompassed fraudulent misrepresentations; (2) that "in certain, very limited circumstances …. silence can amount to a misrepresentation and give rise to a claim in deceit…."; and (3) that there may also be "rare cases in which a positive duty to speak is imposed because of the nature of the relationship between the parties…". If authority was necessary or relevant, the Claimants relied in particular on: *Barclays Bank v Cole* [1967] 2 QB 738; *Newton Chemical Ltd v Arsenis* [1989] 1 WLR 1297; *Clerk & Lindsell on Torts* (19th ed.), esp. at paras. 18-01 and 18-05 *et seq.* However, the Claimants submitted that English law did not recognise a deceit claim against a party in the position of Cavell US "simply by reason of an alleged failure to disclose information". Moreover:

> "….it is not enough for the Defendants to say ….that because (e.g.) New York law imposes a fiduciary duty on a party (here, it is alleged, Cavell US), there is a 'duty to disclose' which gives rise to a liability in deceit under English law. That would be to subvert the (accepted) principle of double actionability – for it would render a party liable under the 'fraud' exception in

> circumstances where he would not be liable applying English law."

It was to be remembered that in English law a fiduciary's duty of disclosure was couched in *negative* rather than *positive* terms: *Bowstead & Reynolds on Agency* (18th ed.), at paras. 6-055 *et seq* and esp. at para. 6-059. The fiduciary was not to put himself in a position where his personal interest was in conflict with his duty to his principal, *unless* he had made full disclosure; it was the conflict that gave rise to a breach of fiduciary duty, rather than the non-disclosure. That New York law might impose a positive duty of disclosure on a fiduciary, was neither here nor there; it was common ground that "fraud" in cl. 13 did not mean "fraud under whatever system of law happens to be dealing with the claim". The Defendants' case on this issue involved no more than an attempt to dress up allegations of breach of contract as fraudulent concealment, so as to get round the release in cl.13. So far as concerned Mr. Randall personally, the basis for any allegation of "fraud" was unclear.

76. Mr. Swainston's submissions, again in broad outline, proceeded as follows. In his submissions before this Court (whatever had been the Defendants' position hitherto), he accepted the double actionability test; necessarily, therefore, the interpretation of "fraud" arose in an agreement governed by and construed in accordance with English law. "Fraud" was not, however, limited to deceit; it also comprehended, at the least, "dishonest breach of fiduciary duty". Spelling it out, "fraud" was apt to cover the following:

> " (1) Claims arising from false representations as to Mr. Randall's and Cavell US's intention to act in Seaton and Stonewall's best interests;
>
> (2) Claims arising from dishonest suppression of the fact that they intended all along to transfer decision making power to NICO;
>
> (3) Claims arising from misrepresentations that Seaton and Stonewall's interests were being served throughout the currency of the Administration Agreements;
>
> (4) Claims arising from the dishonest suppression of the fact that they were not;
>
> (5) Claims arising from dishonest subordination of Seaton and Stonewall's interests to the interest of NICO during the course of purported claims management."

If the English law interpretation of "fraud" was "too narrow in a technical sense" to cover these five heads of claim, then "the sensible commercial interpretation of fraud" as between these parties must encompass them. Against the background that a carve-out for fraud was treated by Dukes Place as a "deal breaker", because it feared that Seaton and Stonewall interests had been subordinated to the interest of NICO in the management of the run-offs, it would be odd if all these claims – concerned as they were with the management of the run-off – had not been preserved. It would be "bizarre" if the parties intended the carve-out to apply to representations made prior to

the Administration Agreements but not to "fraudulent breaches of fiduciary duty" during the period of the agency. Much of this, Mr. Swainston said, was supported by a consideration of the factual matrix.

77. The Claimants had over-stated the differences between English and New York law. In English law, "fraud" was not confined to deceit; dishonesty was a hallmark of fraud and fraud could be equated to dishonesty: see, *Armitage v Nurse* [1997] 3 WLR 1046, esp. at pp. 1052-1054. In any event, the deceit may lie in silence where there is a dishonest breach of a duty to speak. That duty could arise from a fiduciary relationship and breach of such a duty could sound in damages (not simply result in rescission or other equitable remedies): see, *Conlon v Sims*, at first instance, [2006] EWHC 401 (Ch), at [202]; in the Court of Appeal, [2006] EWCA Civ 1749; [2008] 1 WLR 484, at [130]. Furthermore, any difference between New York and English law was irrelevant; the question of what Seaton and Stonewall could properly expect to be told by Cavell US arose under New York law; if Cavell US was thus under a duty to speak and remained silent, it would be in breach of duty; if that breach was dishonest, it would amount to dishonest silence and, hence, fraud under English law.

78. As to the Defendants' case against Mr. Randall personally, Mr. Swainston indicated: (1) that he would be liable in fraud if he had knowingly made dishonest representations intended to be relied upon, regardless of the fact that he was doing so on behalf of or for the benefit of a company: *Standard Chartered Bank v Pakistan Shipping Corporation* [2003] 1 AC 959, at 968; (2) that he would be liable for "dishonestly procuring" Cavell US's breach/es of fiduciary duty.

79. *(IV) Discussion: (1) Ordinary meaning:* I begin with a consideration of the natural meaning of "fraud" in an English law contract. To my mind, of that, there is little doubt.

80. *Barclays Bank v Cole* (*supra*) involved an action by a bank against a convicted robber (the defendant) to recover the proceeds of the robbery and other sums. The issue was whether the robber, who wished to have his guilt or innocence retried, could insist on a trial by jury – something he could do as of right under the then applicable law in respect of a "charge of fraud". The defendant's application for jury trial was rejected by the Master, the Judge and, in trenchant terms, by the Court of Appeal. Lord Denning MR said this (at pp. 743-4):

> "'Fraud' in ordinary speech means the using of false representations to obtain an unjust advantage: see the definition in the Shorter Oxford English Dictionary. Likewise in law 'fraud' is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false: see *Derry v Peek*, *per* Lord Herschell. In any case, 'fraud' involves a false representation. Robbery does not. "

Diplock LJ (as he then was) put the matter this way (at pp. 744-5):

> " Robbery is not included in the ordinary meaning of the word 'fraud' – as the Oxford English Dictionary confirms……For at least 100 years (see Bullen & Leake's, Precedents of Pleadings,

> 3rd ed. (1868)), 'fraud' in civil actions at common law, whether as a cause of action or as a defence, has meant an intentional misrepresentation (or, in some cases, concealment) of fact made by one party with the intention of inducing another party to act upon it, which does induce the other party to act upon it to his detriment……
>
> In civil actions it [i.e., fraud] has long had a precise limited meaning as a term of art, and I see no reason for ascribing any wider meaning to it…."

Finally, Russell LJ (as he then was) said the following (at p.746):

> "On the construction of the section I agree that this is not an action in which 'a charge of fraud against….(the defendant)…. is in issue'. I agree with the Judge that fraud is used here in its ordinary and primary sense of deceit, and not as referring generally to dishonesty."

81. As to the nature of a claim in deceit, *Clerk & Lindsell* (*supra*) refers (at para. 18-01) to "the tort of deceit (sometimes called simply 'fraud'….".) The gist of this cause of action is stated as follows (*ibid*):

> " Where a defendant makes a false representation, knowing it to be untrue, or being reckless as whether it is true, and intends that the claimant should act in reliance on it, then is so far as the latter does so and suffers loss the defendant is liable for that loss…."

82. While the general rule is that a positive act or representation is required and that "mere silence" (however morally wrong) will not support an action in deceit, as observed by Lord Eldon in *Turner v Harvey* (1821) Jac 169 at p.178 (cited in *Spencer Bower, Turner & Handley, Actionable Misrepresentation* (4th ed.), at para. 92):

> "…but a very little is sufficient to affect the application of that principle. If a word, if a single word, is dropped which tends to mislead the vendor, the principle will not be allowed to operate."

83. Moreover, it is to be kept in mind that representations may be express or implied. As helpfully summarised in *Spencer Bower (op cit)*, at para. 49:

> " An implication may arise from the conjoint effect of several express statements, or from what is said, coupled with what is left unsaid; it may arise from acts and conduct or, in a limited class of case, from silence."

84. Without for a moment suggesting that these are anything other than examples, as is clear from both *Clerk & Lindsell* (at paras. 18-05 *et seq*) and *Spencer Bower* (at paras. 75 *et seq*) to which I was helpfully referred, there are a variety of circumstances in which conduct, past conduct, previous statements or even silence are capable of

giving rise to a misrepresentation – which will be fraudulent if false to the knowledge of the representor. These circumstances include the following:

i) Half-truths or the omission of qualifying facts;

ii) A failure to correct a statement (true when made but, subsequently, to the knowledge of the maker, falsified by events);

iii) Conduct involving concealment;

iv) Silence in conjunction with something previously said or done;

v) Limited categories of case where, by reason of the nature of the relationship between the parties, a positive duty to speak is imposed, so that silence is capable of giving rise to a misrepresentation. (In passing, *Conlon v Simms* (*supra*), relied on by Mr. Swainston, which involved a partnership relationship long regarded as one of *uberrimae fidei*, strikes me as an example of such a case - but does not otherwise take the present matter further.)

85. Unsurprisingly, if I may say so, "fraud" does not in all circumstances mean "deceit". Some times it has a different or wider meaning. In *Armitage v Nurse* (*supra*), a clause in a settlement exempted the trustee from liability for any loss or damage "….from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud….". The decision in that case was that "actual fraud" meant what it said; it did not mean "constructive fraud" or "equitable fraud"; the liability of the trustee was excluded in the absence of dishonest intention on his part: see, at pp. 1052-1053. Millett LJ (as he then was) did not, however, stop there and Mr. Swainston placed much reliance on his additional observations (at pp. 1053-4). Millett LJ remarked that the common law knew no "generalised tort of fraud"; care was needed when applying concepts relevant to *Derry v Peek* (i.e., fraudulent misrepresentation or deceit) to a breach of trust; breaches of trust were of many different kinds; a deliberate breach of trust was not necessarily fraudulent; the expression "actual fraud" in the settlement under consideration was "not used to describe the common law tort of deceit". Millett LJ continued as follows (*ibid*):

> " As the judge appreciated it simply means dishonesty. I accept the formulation put forward by ….[counsel]…which is that it
>
> 'connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not.'
>
> It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests then he is acting dishonestly. "

So, here, Mr. Swainston submitted, "fraud" in the carve-out was not to be equated with or confined to fraudulent misrepresentation. It would include, as he put it, a

dishonest breach of fiduciary duty. I shall return, specifically, to this submission below.

86. For present purposes, I draw the following conclusions from this discussion.

i) First, as a matter of language, the ordinary and primary meaning of the word "fraud" involves the use of false representations to obtain an unjust advantage, conveying the sense of deceit.

ii) Secondly, the same is true of civil actions at common law – though of course additional ingredients are needed to succeed in a *Derry v Peek* claim. It is to be kept in mind that, as observed by Millett LJ, the common law knows no "generalised tort of fraud".

iii) Thirdly, the scope of the ordinary and primary meaning of "fraud" at common law encompasses instances where conduct, concealment and silence are capable of giving rise to misrepresentations. Deceit is not confined to cases of express (mis)representations.

iv) Fourthly, "fraud" is capable of a different or wider meaning, referring generally to "dishonesty" if the context so requires.

v) Fifthly, here, I am provisionally of the view that in the carve-out contained in cl.13(iii) of the Term Sheet, "fraud" has its ordinary and primary meaning of deceit. As so often with matters of construction, first impressions are important – and as a matter of first impression, that is the meaning which the language used by the parties conveys to me. I have in any event to ask what the carve-out does mean. There is, as already underlined, no generalised tort of fraud. Once driven back from any such generalised notion, I am attracted to the anchor furnished by the ordinary and primary meaning of the word. Concerns, that the ordinary and primary meaning of "fraud" might be too narrow or otherwise inappropriate in the context of the provision of run-off management services, are very considerably assuaged by the consideration that in its natural and ordinary meaning a claim for fraud (or deceit) is not confined to cases of express misrepresentation. Plainly, however, I must go on to consider whether there are here contextual or other reasons requiring that some different or wider meaning should be given to "fraud" in the carve-out.

87. *(2) The structure of the Term Sheet:* Going to the structure of the Term Sheet, Mr. Hofmeyr submitted that the fraud carve-out was an exception to the general release contained in cl.13 and was therefore to be narrowly construed. I think there is force in this submission at least to this extent: the fraud carve-out in cl. 13(iii) was an exception to the general release and is to be approached as such. By itself, that is by no means decisive – but certainly it lends no support to any argument for "fraud" to be given a wider meaning in this carve-out.

88. *(3) The factual matrix:* I have already summarised the extensive evidence as to the factual matrix. With great respect to the parties, in my judgment, only the most limited assistance was to be derived from this study of the history of their developing antagonism. Serious charges were made in the evidence and I have thought it right to

canvass these, however briefly. But when I return to the Preliminary Issues, this history takes the matter very little further forward.

89. For my part, I derive from the history the following:

i) I accept, as I am bound to do, that it does not fall to me to determine the merits of the underlying disputes between Dukes Place and Randall. Nonetheless, given that allegations of "fraud" have been aired, I cannot fail to observe that the claim against Mr. Randall personally (which has, doubtless, done much to inflame the atmosphere), is anything but conceptually straightforward – at least so far as it goes beyond allegations of fraudulent misrepresentation. Furthermore, the claim of fraud against Randall encounters obvious difficulty when regard is had to (1) the reinsurance framework and (2) the documentary evidence of disclosure of the Collaboration Agreement – but I of course accept from Mr. Swainston that there is other material, said to be capable of supporting the claim and which I have not seen. I also do keep in mind that there were aspects of Mr. Randall's evidence which, as recorded, were apt to raise concerns. Accordingly, I proceed on the assumption that Seaton and Stonewall may have at least a good arguable case (put neutrally) of "fraud" of some description against Cavell US and Mr. Randall; it is no part of my task to consider whether any such claim or part of such claim should be struck out.

ii) As already described, at the time the Term Sheet came to be negotiated, litigation, concerning the management of the run-off of Seaton and Stonewall and the alleged failure of Randall to safeguard their interests, was a possibility. Mr. Randall resented such allegations greatly; he had to take them seriously but viewed them as nonsense. He wanted and obtained a release. He also wanted but did not obtain an unqualified release. Dukes Place wanted and obtained a carve-out for "fraud on the part of Randall" from the general release set out in cl. 13 of the Term Sheet. It does not at all follow, merely because Dukes Place had ventilated a variety of allegations in the months preceding the conclusion of the Term Sheet, that all such claims were to survive the release. That is to beg the question.

iii) Pulling the threads together, I come to a conclusion to which I confess I would likely have come as readily without the matrix evidence. The only claims preserved were claims for "fraud on the part of Randall". The matrix did not persuade me that this definition, without more, encompassed all the allegations previously ventilated by Dukes Place arising out of Randall's management of the run-off of Seaton and Stonewall; had that been the parties' intention, very different wording could and, in my judgment, would have been used. The Term Sheet was the product of hard bargaining; there was an element of give and take; the factual matrix does not support the notion that Dukes Place obtained everything it wanted. Conversely – for similar reasons and for the avoidance of any doubt – insofar as Mr. Randall was dismissive of the "nonsense" which he suggested had been aired over the period November 2005 to February 2006, it does not follow that claims arising out of the Randall management of the Seaton and Stonewall run-off were not preserved; had the parties intended to release all such claims, again, different wording could and would have been used. If such claims (if made good) constituted "fraud on the part of the Randall", they would be covered by the cl. 13(iii) carve-out. In

summary, therefore, claims arising out of the Randall management of the Seaton and Stonewall run-off were capable of being preserved – but if and only if (assuming they were made good) they constituted "fraud" so as to come within the carve-out. In the event, the parties agreed that the meaning of "fraud" in cl. 13(iii) is to be determined as a matter of the construction of an English law agreement.

iv) Beyond these conclusions, some fairly anodyne, I did not think that the factual matrix assisted. At all events, it did not, in my judgment, serve to equate allegations ventilated by Dukes Place with claims preserved by the cl.13(iii) carve-out. It did not therefore persuade me of the need to adopt some meaning of "fraud", different from or wider than its primary meaning.

90. *(4) Dishonest breach of fiduciary duty?* Mr. Swainston submitted that the "fraud" carve-out extended to dishonest ("fraudulent") breaches of fiduciary duty. With respect, this submission, though not unattractive at first blush, is untenable.

i) The short answer is that in English law the relevant cause of action and, hence, the relevant inquiry, is whether or not there has been a breach of fiduciary duty. If there has, then liability is established. Save, possibly with regard to certain (and for present purposes, irrelevant) questions of limitation, it would be unnecessary to plead, allege and prove that the breach was fraudulent (dishonest). In more technical terms, dishonesty is not an essential ingredient of the cause of action. See, for example, the discussion in *Newton Chemical Ltd v Arsenis* (*supra*), at p.1302. It follows that if the Defendants' contention was well-founded, then it would be open to Seaton and Stonewall: (1) to allege a "fraudulent" (dishonest) breach of fiduciary duty, so circumventing the constraints of the general release contained in cl. 13 of the Term Sheet and purportedly bringing the matter within the cl.13(iii) carve-out; (2) thereafter to succeed on the claim *without* succeeding on the allegation of fraud – or indeed without the allegation of fraud even being determined. It is no mere theoretical possibility that a Judge, faced with an averment of a "*fraudulent* breach of fiduciary duty" would decline to rule on the question of dishonesty if it was unnecessary to do so. As it seems to me, that cannot be right. Put another way, that cannot be what the parties envisaged when drafting cl. 13 of the Term Sheet. While the carve-out was emphatically not confined to a "finding of fraud" (something Mr. Randall wanted and Dukes Place refused), it contemplated a claim, properly brought and pleaded, which, if it succeeded, would result in a determination or finding of fraud. This conclusion is sufficient to dispose of this particular submission but out of courtesy I add a few words as to *Armitage v Nurse (supra).*

ii) The Defendants' submission here was that just as in *Armitage v Nurse* "actual fraud" meant "dishonesty" (or dishonest breach of trust) rather than deceit, so in the cl. 13(iii) carve-out "fraud" meant "fraudulent breach of fiduciary duty". I readily accept, as already foreshadowed, that *Armitage v Nurse* serves to illustrate that "fraud" may have a meaning other or wider than "deceit". Further and to my mind, having regard to their source, it matters not whether the observations prayed in aid by Mr. Swainston were, strictly, *obiter*. However, having anxiously and with respect considered the observations of Millett LJ, I am unable to accept that they assist Mr. Swainston's argument in

this case. Quite simply, given the language of the settlement with which Millett LJ was concerned, the relevant clause could not or not realistically have been dealing with "deceit". The context therefore required some different meaning.

91. *(5) Double actionability and New York law:* Although there was force in Mr. Swainston's submission that the differences between English law and New York law should not be over-stated, there *are* differences which cannot be ignored. First, having regard to the Joint Memorandum, a claim for dishonest breach of fiduciary duty can be advanced under New York law whereas such a claim encounters the difficulties to which I have already alluded in English law. Secondly, again mindful of the Joint Memorandum, a positive duty to speak could arise from a fiduciary relationship as a matter of New York law, so that silence would be a breach of fiduciary duty and, if dishonest, was capable of amounting to fraud. By contrast, in English law, the position in my judgment is somewhat different. Mr. Hofmeyr's submission, founded on *Bowstead & Reynolds* (*loc cit)*, was that fiduciary obligations are essentially negative rather than positive; the fiduciary must refrain from putting himself into a position where his personal interest is in conflict with his duty to his principal, *unless* he has made full disclosure; it is the conflict of interest, rather than the non-disclosure which gives rise to the breach of fiduciary duty. In my judgment, there is considerable force in this submission but even if and to the extent that it is over-stated or over-simplified, I am amply satisfied that it is easier under New York law than under English law to spell out a breach of fiduciary duty from mere silence. It will be apparent that, broadly speaking, the effect of these differences is to make it more difficult, in the present context, to bring a claim for "fraud" in English law than it would or might be under New York law.

92. Against this background, it will be recollected: (1) that the Defendants disclaimed any suggestion that "fraud" in cl. 13(iii) of the Term Sheet meant any claim which would constitute fraud under the law governing the antecedent transaction – New York law in the case of the Seaton and Stonewall Administration Agreements; (2) that, as a matter of common ground, for a claim to constitute "fraud" within the cl. 13(iii) carve-out, a "double actionability" test must be satisfied – the claim must constitute "fraud" both as a matter of English law (the governing law of the Term Sheet) and as a matter of the governing law of the antecedent transaction. It is for this reason – and given the two relevant differences between the systems of law already highlighted - that I have so far focused on English law, rather than New York law. It is a *necessary* if not a *sufficient* condition for a claim to come within the cl. 13(iii) carve-out that it constitutes "fraud" within the meaning of an English law agreement.

93. As foreshadowed however, Mr. Swainston, submitted that none of this mattered. Cavell US were in a fiduciary relationship with Seaton and Stonewall. To ascertain the fiduciary duties owed by Cavell US to Seaton and Stonewall it was necessary to have recourse to New York law. Under New York law, Cavell US owed Seaton and Stonewall a duty to disclose or speak. It followed that silence, in the teeth of a duty (under New York law) to speak, involved a breach of duty. If that breach, or silence, was dishonest, then the analysis under English law was that there had been a dishonest breach of a duty to speak and, accordingly, "fraud".

94. With respect, while acknowledging the forensic skill in its construction, I am unable to accept that submission. First, I do not think that the conflation of New York law

and English law is permissible. Secondly, if the submission was well-founded, it would drive a coach and horses through the requirement of double actionability – which, as already underlined, was a matter of common ground. In truth, the submission is indistinguishable from, if a more sophisticated variant of, the argument disclaimed by the Defendants – namely, that "fraud" in cl. 13(iii) of the Term Sheet meant any claim which would constitute fraud under the law governing the antecedent transaction. Thirdly, the key question is whether English law, rather than New York law, imposes a positive duty to speak in the circumstances of which complaint is made. If it does so, then a dishonest silence may be capable of giving rise to a claim within the ambit of the tort of deceit. But the question needs to be asked and answered in terms of English law; the mere failure on the part of a fiduciary to disclose information amounting to a breach of fiduciary duty under New York law will not suffice.

95. For completeness, I have not overlooked the Defendants' submission that in construing the meaning of "fraud" in cl.13(iii) of the Term Sheet, I should be "informed" by the meaning given to it under New York law, the governing law of the antecedent transaction. However, as it seems to me, it is inherent in the Defendants' acceptance of the double actionability requirement, that the two systems of law *may* point to a different conclusion. Nor, I should add, do I regard the primary meaning of "fraud" under English law as technical, narrow or artificial so as, on such grounds, to cause me to opt for the wider meaning suggested by New York law.

96. *(6) Overall conclusion as to Cavell US:* Pulling the threads together:

i) In construing the cl. 13(iii) carve-out in the Term Sheet, my task (as, *mutatis mutandis*, with the construction of cl. 29) is the ascertainment of the meaning which "fraud" would convey to reasonable parties having the background information reasonably available to the parties here. The approach is, again, objective; the subjective views of the parties or either of them are irrelevant. The Term Sheet is governed by English law, so the inquiry is as to the meaning of "fraud" in an English law agreement. Moreover, so far as double actionability is concerned, as already suggested, if words or conduct would amount to "fraud" in English law, then they are likely to do so under New York law, whereas the converse is by no means the case. It therefore follows that the focus must be on English law.

ii) As a matter of English law, it seems to me that the choice must lie between "fraud" having its primary meaning of deceit or some distinctly open-ended carve-out. My provisional inclination was to prefer the primary meaning. Having now considered the various arguments put forward by the Defendants in favour of some different or wider meaning, I am not persuaded by them. I confess that I would have hesitated long and hard before concluding that the parties had agreed upon an open-ended carve-out – but that would have been the upshot of the Defendants' submissions. Indeed, once the safe ground of the primary meaning of "fraud" is abandoned, it is not at all clear where to stop.

iii) The Defendants' submission, that it would be "bizarre" if the carve-out preserved misrepresentations made prior to the Administration Agreements but not to "fraudulent breaches of fiduciary duty", is, with respect, misplaced. It ignores the fact that in its primary meaning, "fraud" is not confined to express

(mis)representations. As already explained, in appropriate circumstances, conduct, previous statements and even silence are capable of giving rise to fraudulent misrepresentations. Accordingly, though subject always to compliance with the English rules as to when fraud can properly be pleaded, confining the Defendants to claims against Randall within the primary meaning of "fraud" ought not to produce some *artificial* shutting out of any claims relating to the Randall management of the run-off which ought otherwise to have been preserved. Put another way and recognising that a line needs to be drawn between the general release in cl.13 and the cl.13(iii) carve-out, I am not persuaded that the carve-out was intended to encompass any claims which could not be so framed. I see no unreasonableness, inappropriateness or (so far as relevant) injustice, in this conclusion. The carve-out should not be construed so as to consume the otherwise general release in cl.13.

iv) It is not for me to say whether any particular head of claim (see, for example, the five matters canvassed by Mr. Swainston in his submissions and recorded above) is capable of being brought within the primary meaning of "fraud" or can properly be pleaded. That must be for another day. It suffices for me to answer Issue B(1) as follows: *"fraud" in the cl. 13(iii) carve-out of the Term Sheet is to be construed as having its primary meaning of deceit*.

97. *(7) The position of Mr. Randall:* I turn to the position of Mr. Randall, as distinct from that of Cavell US. It is not suggested that Mr. Randall was personally in a fiduciary relationship with Seaton and Stonewall.

98. Insofar as any claim for "fraud" is sought to be maintained against him personally pursuant to cl.13(iii) of the Term Sheet, I accept Mr. Swainston's submission that there is no conceptual difficulty in doing so, if confined to dishonest representations knowingly made by Mr. Randall himself; see *Standard Chartered Bank v Pakistan Shipping Corporation (supra)*. Of course, any such claim must be capable of satisfying the rules of this Court as to the pleading of fraud.

99. As to the second way in which Mr. Swainston sought to justify the Dukes Place stance vis-à-vis Mr. Randall personally, namely, dishonestly procuring Cavell US's breach/es of fiduciary duty:

i) I am prepared to assume (without deciding) in Mr. Swainston's favour that there is such a cause of action;

ii) Without more that cause of action will not assist the Defendants in the light of my conclusion as to the meaning of "fraud" in cl. 13(iii);

iii) For the avoidance of doubt, any claim pursued against Mr. Randall personally would need to come within the meaning of "fraud" as set out above.

PRELIMINARY ISSUE B(2)

100. In the light of my conclusion as to Preliminary Issue A, it seems plain to me that Preliminary Issue B(2) does not arise. I acknowledge with gratitude the careful arguments addressed to this Issue but it seems to me both inappropriate and futile to

venture into the detail of the First Amended Complaint when it is unnecessary to do so. I therefore express no view on Preliminary Issue B(2).

101. I shall be grateful for the assistance of counsel in drawing up the appropriate order and on all questions of costs.