Neutral Citation Number: [2021] EWHC 631 (Comm)

Case No: CL-2019-000036

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
7 Rolls Buildings, Fetter Lane,
London, EC4A 1NL
Date: 19 March 20021

Before :

MS. LEIGH-ANN MULCAHY QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

(1) EQUITAS LIMITED
(2) EQUITAS INSURANCE LIMITED **Claimants**

- and –

(1) SANDE INVESTMENTS LIMITED
(2) LIME STREET INVESTMENTS LIMITED
(3) DERMAVALE LIMITED
(4) SENATOR INSURANCE HOLDINGS LIMITED
(5) ENIGMA MANAGEMENT SERVICES LIMITED
(6) LIME STREET INSURANCE BROKERS LIMITED
(7) CRS GROUP (LONDON) LIMITED
(8) PWK LIMITED
(9) SENATOR INSURANCE SERVICES LIMITED

Defendants

- -

Mr. Stuart Benzie (instructed by **DWF LLP**) for the **Claimants**
Mr. Jason Evans-Tovey (instructed by **Carter Perry Bailey LLP**) for the **Defendants**

Hearing dates: 25, 26, 27, 28, 29 January 2021

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Approved Judgment

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

…….

MS. LEIGH-ANN MULCAHY QC

Ms Leigh-Ann Mulcahy QC (sitting as a Deputy High Court Judge):

Introduction

1. This action is brought by the Claimants, Equitas Limited and Equitas Insurance Limited, (whom I will generally refer to in this judgment jointly as "**Equitas**") in their capacity as assignee of all rights, title and interest of all Lloyd's Syndicates in respect of all non-life liabilities under contracts of insurance, reinsurance and retrocession underwritten by the Syndicates and allocated to their 1992 and prior years of account.

2. In its claim, Equitas alleges that the Defendants (though now only four of the original nine Defendants, as explained at paragraphs [6 & 90] below) have failed to remit various sums owing to the Syndicates and/or Equitas in respect of certain "Outward Protections" (i.e. contracts of 'outwards' excess of loss insurance or reinsurance or retrocession). The claim is brought against those Defendants on the basis that they are alleged to have been responsible for administering the operations or run-off of certain insurance/reinsurance brokers, including those who placed the relevant Outwards Protections. Equitas claims that, in failing to remit these sums, the Defendants were in breach of various duties alleged to have been owed by them to the Syndicates and Equitas. In addition to claiming for the principal sums still alleged to be due and owing by the Defendants (or damages in the alternative), Equitas also claims damages in respect of the investment income that would have been earned if the sums had been duly paid over at the proper time. Equitas further claims restitution of the benefits received by the Defendants by reason of their retention of sums payable to the Syndicates and/or Equitas. Equitas further seeks the remedy of a general account and payment of all interest and/or other profits earned by the Defendants in connection with the Outwards Protections by reason of their receipt and/or retention of funds which should have been remitted to Equitas but have not been.

3. The Defendants deny that they are under any liability to Equitas. In essence, they say that the only Defendant which collected any sums that may have been payable to the Syndicates and/or Equitas was the Fifth Defendant, which was acting in the capacity of a debt collector rather than as an insurance/reinsurance broker. The Fifth Defendant transferred all its insurance files relating to this book of business to Equitas between 2006 and 2009 and no longer has any records which might enable it to identify whether the sums claimed by the Claimant were received by it, and, if so, what happened to those funds. However, it is contended that, if the Fifth Defendant did collect and fail to pass on any of the sums claimed, those sums were received by the Fifth Defendant between 1998 and 2004 (according to paragraphs 19 and 20A of the Amended Particulars of Claim) and the Defendants deny that they were under any continuing duty to remit any such sums to Equitas. They say that the funds would have been held in one of several unsegregated bank accounts (depending on the currency of the funds) used for all of the Fifth Defendant's business activities, the balance of which was transferred to the Third Defendant in 2004 when the Fifth Defendant stopped conducting any unregulated business. In these circumstances, the Defendants contend that any claims Equitas may have had against the Fifth Defendant, or any of the other Defendants, are time barred and/or barred by laches.

4. Equitas denies that the claims are time-barred for a number of reasons. In particular, they say that the Defendants were under continuing obligations to remit the sums claimed, which continued until at least 6 years prior to the commencement of the proceedings;

and/or that there were deliberate concealments of facts relevant to their rights of action, so that they are entitled to rely on section 32(1)(b) of the Limitation Act 1980 and/or that their claims constitute an action to recover trust property or the proceeds of trust property, so that they are entitled to rely on section 21(1)(b) of the Limitation Act 1980. The Defendants dispute all these arguments.

5. It became apparent during the trial that the value of the claim set out in the Amended Particulars of Claim had been over-stated. In closing submissions, Equitas amended the value of its claim to $96,946.62 and £12,243.93 in relation to the "Pateman claims" and $225,331.12 and £26,365.67 in relation to the "Cotesworth claims". The total value of the quantified claim is therefore for $322,277.74 and £38,609.60.

6. On 29 January 2021, by consent, judgment was entered by the Second, Sixth, Seventh, Eighth and Ninth Defendants against both Claimants on all claims against them in the action. This was in circumstances where it was accepted by the Claimants that there was no evidence of their involvement in collection or receipt of any relevant sums which form the subject of the claim. Accordingly, the claim now proceeds solely against the First, Third, Fourth and Fifth Defendants.

7. For completeness, I would record that a claim based on "knowing receipt" was advanced by the Claimants in their opening submissions. This was objected to by the Defendants, inter alia, on the basis that it had not been pleaded. It was correct that such a claim had not been pleaded. The Claimants elected not to apply for permission to amend their pleaded case and accordingly, that claim was not further pursued.

8. I will start by setting out the facts relevant to the claim.

Factual background to the claim

Lloyd's Reconstruction and Renewal Plan

9. In the late 1980s and early 1990s there was extraordinary turmoil in the Lloyd's insurance world, primarily as a result of Lloyd's syndicates' exposure to potentially crushing liabilities which shook the market to its foundations. A reconstruction arrangement was created in which fresh capital was introduced and Names who wished to resign were given the opportunity to do so. As a consequence, the First Claimant became the assignee of the interests held by all Lloyd's syndicates in contracts of reinsurance, held by those syndicates, in respect of all non-life liabilities under contracts of insurance, reinsurance and retrocession underwritten by the syndicates, for their 1992 and prior years of account. That assignment was a part of the Lloyd's Reconstruction and Renewal Plan pursuant to which Equitas was responsible for the solvent run-off of approximately £15 billion of liabilities.

Assignment to the Claimants

10. The assignment to the First Claimant was effected as follows:

    (1) The liabilities under contracts of insurance and reinsurance underwritten by the syndicates for the relevant period were reinsured by Equitas Reinsurance Ltd

("**ERL**"), pursuant to the 'Reinsurance and Run-Off Contract' dated 3 September 1996 ("**the Run-Off Contract**") and retroceded by ELR to the First Claimant, pursuant to a 'Retrocession Agreement' dated 3 September 1996 ("**the Retrocession Agreement**").

(2) The Run-Off Contract provided for the assignment by the syndicates of all proceeds and the right to receive proceeds (whether or not accrued) of all syndicate reinsurance contracts either to a trustee ("**the Trustee**") or to ERL.

(3) The Retrocession Agreement provided for the assignment by ERL to the First Claimant, Equitas Limited, of all such rights as had been assigned to it pursuant to the Run-Off Contract and all rights of the syndicates as might be assigned to it pursuant to the Assignment Agreement made on 4 September 1996 by which the Trustee assigned to ELR all such rights as had been assigned to it pursuant to the Run-Off Contract.

(4) Pursuant to an agreement entitled the 'Lioncover Reinsurance Contract' made on 18 December 1997, Lioncover Insurance Company Limited ("**Lioncover**") assigned to ERL all the rights of the various syndicates as set out above, Lioncover having earlier been assigned such rights by those syndicates.

11. Pursuant to Part VII of the Financial Markets and Services Act 2000, the assets (subject to the rights of Equitas Limited pursuant to the Retrocession Agreement) and the liabilities of underwriters at Lloyd's in respect of the 1992 and prior business were transferred to the Second Claimant, Equitas Insurance Limited, with effect from 30 June 2009.

12. The Claimants served Notices of Assignment of the interests of the Syndicates to Equitas Limited on the Defendants on 16 January 2019, prior to issue of this claim.

The Defendants

13. The Defendant companies were all members of the Senator Group of companies from 2009 to 2018. I will focus only on those companies who remain Defendants to the claim.

14. The First Defendant, Sande Investments Limited (now called SIL 1992 Limited) ("**Sande Investments**") was incorporated on 1 June 1992. Mr Paul Nugent ("**Mr Nugent**") was appointed as a director on 3 June 1992. Other than for a 3 day period in 1992, Mr Nugent has always been the sole director of Sande Investments and holds in excess of 75% of the shares of the company. Sande Investments is the holding company that holds not less than 75% of the shares in the Third and Fourth Defendants, and indirectly, the Fifth Defendant.

15. The Third Defendant, Dermavale Limited ("**Dermavale**") was incorporated on 14 February 1992. Mr Nugent was appointed as a director on 8 January 1997. He is currently the sole director. Mr Peter Webb ("**Mr Webb**") was a director of Dermavale from 5 June 1992 until 14 September 2009. The shares in Dermavale are held by Sande Investments.

16. The Fourth Defendant, Senator Investment Holdings Limited (now SIH 1996 Limited) ("**Senator Insurance Holdings**") was incorporated on 4 December 1996. Mr Nugent was appointed as a director on 14 January 2002. The company was known as Ashmore Holdings Limited from 4 December 1996 to 21 December 2004. Mr Webb was a director

of Senator Insurance Holdings from 14 January 2002 to 14 September 2009. Mr Nugent has been the sole director since that date. The shares in Senator Insurance Holdings are held by Sande Investments.

17. The Fifth Defendant, Enigma Management Services Limited (whom I shall refer to as "**Senator**" since that is more in accord with its name during the periods relevant to this case), was incorporated on 28 September 1960. It has traded under a number of different names, most recently (a) from 1 May 1991 to 21 December 2004 as Senator Consultants Limited and (b) from 21 December 2004 to 10 January 2018 as Senator Broker Services. Companies House records Senator as being engaged in "Activities of insurance agents and brokers". Mr Nugent is a director of Senator. Although his date of appointment as director is not shown on the Companies House records, in his evidence he stated that he first became a director in February 1991. Mr Colin Langley ("**Mr Langley**") was appointed as a director of Senator on 16 April 2008 and remains a director. Mr Webb was a director of Senator but resigned on 14 September 2009. The shares in Senator are held by Senator Insurance Holdings.

18. The shares of Dermavale, Senator Insurance Holdings and Senator are ultimately owned by Sande Investments, which is in turn majority-owned by Mr Nugent.

The Broker Cash Flushing Project

19. In around 2005, Equitas began a project to identify whether there existed any amounts that had been recovered by Lloyd's brokers but had not been remitted to Equitas.

20. Mr Philip Davey ("**Mr Davey**") of Equitas was appointed to manage the project and he was assisted by Mr David Luben ("**Mr Luben**") and Mr Colin Braithwaite ("**Mr Braithwaite**").

21. The project covered the full range of Equitas' liabilities and involved investigating Lloyd's market transactions.

The Pateman and Cotesworth Syndicates

22. The present claim relates to amounts claimed to have been recovered by Senator in respect of two reinsurance contracts brokered by Lloyd's broker, Dewey Warren & Company Ltd (broker code DWC 720), in about 1985, for two Lloyd's Syndicates, R.M. Pateman & Others ("**the Pateman Syndicate**") and R. Cotesworth & Others ("**the Cotesworth Syndicate**"). The two contracts are the R.M. Pateman & Others reinsurance contract 852495 covering Excess of Loss account occurring during the period 1 January 1985 to 31 December 1985 and the R. Cotesworth & Others reinsurance contract 852238 covering Excess of Loss account occurring during the period 1 January 1985 to 31 December 1985.

The Biddencare Agreement

23. On 31 March 1992, an agreement was entered into between Biddencare Limited ("**Biddencare**"), Dermavale, Senator and various companies referred to as "the Run-Off Companies" ("**the Biddencare Agreement**"). The written contract recording the Biddencare Agreement was entered into on 11 June 1992.

24. The relevant provisions of the Biddencare Agreement are as follows:

"*WHEREAS: -*

(A) By a number of agreements, brief details of which are set out in the Second Schedule hereto ("the Agreements"), Biddencare acquired the remaining and existing businesses of each of the Run-Off Companies being in each case that part of the business carried on by each of them which had been placed by it for its clients, but who were at the date of the relative Agreement, no longer its clients and which business had not been transferred or sold by it pursuant to any previous agreements, such business being transferred being described in the Agreements and hereafter described in this Agreement as the "Old Business" and all such businesses so acquired by Biddencare, being together hereinafter described as "the Old Businesses" for consideration therein specified and Biddencare accepted responsibility for their run-off as therein set out.

(B) The parties hereto agreed on 31st March 1992 that Biddencare should sell and Dermavale should purchase all its right, title and interest in the amounts due from the Insurance Debtors of the Run-Off Companies as represented by a debit entry on the Insurance Ledger whether of Biddencare or the respective Run-Off Company and to the extent that they were still outstanding ("the Insurance Debts") upon condition that Dermavale would accept certain responsibilities for the collection of the Insurance Debts and the subsequent settlement of the amounts due to the relative Insurance Creditor and the parties have agreed now to enter into this Agreement to record, ratify and confirm the agreement reached on 31st March 1992.

NOW IT IS HEREBY AGREED AND DECLARED as follows: -

1. <u>Sale and Purchase</u>

Subject as hereinafter provided, Biddencare, to the extent and insofar as it has any right, title or interest in the same, shall sell free from all liens, charges and encumbrances and Dermavale shall purchase with effect from 1st April 1992 ("the Effective Date"): -

(a) the Insurance Debts; and

(b) all the policies, contracts, accounts, documents, information and other material within the possession, custody, power or control of Biddencare or which Biddencare acquired pursuant to the Agreements and which Biddencare retains which concern specifically the Insurance Debts or which may reasonably be required by Dermavale for or to facilitate the collection of the Insurance Debts.

2. <u>Consideration</u>

The consideration for the said sale shall be: -

(i) the sum of £1 (one pound) in cash; and

(ii) the obligations of Dermavale contained in clause 3 hereof.

3. Dermavale's Obligations

Dermavale agrees with Biddencare and in relation to the Insurance Debts of each of the Run-Off Companies with the relevant Run-Off Company that subject as hereinafter mentions it will at the cost of Dermavale:

(i) as soon as reasonably practicable after the date hereof review the Insurance Debts and so far as is reasonably practicable sort out all the files, records and other documents concerning the Insurance Debts;

(ii) whenever Dermavale considers it reasonably practicable and economically prudent having regard to the likely cost of so doing, identify and make arrangements with the Insurance Creditors to collect the related Insurance Debts (transferred to Dermavale) and apply each amount so collected in settlement of the amount due to the related Insurance Creditor and in pursuance of and in full and complete satisfaction of its obligations hereunder;

(iii) Dermavale and Senator will enter into an agreement whereby Senator will carry out such obligations on behalf of Dermavale and each agreement will, following the signing of this Agreement, be entered into in the form of the agreement set out in the Third Schedule hereto. [In fact there was no agreement set out in the Third Schedule].

4. In consideration of the obligations set out in Clause 3 above, each of the Run-Off Companies hereby ratifies and confirms: -

(i) the terms of this Agreement;

(ii) its agreement to Dermavale engaging Senator in the form set out in the Third Schedule hereto to collect the Insurance Debts;

(iii) the right of Dermavale and/or Senator (subject to its entering into agreement with Dermavale in the form of that set out in the Third Schedule hereto) to act as agent for each of the Run-Off Companies and in its name to collect the Insurance Debts at the cost and expense of Dermavale and/or Senator as the case made by; and

(iv) that it relinquishes all right, title and interest to any policies, contracts, accounts and other documents which in any way relate to the Insurance Debts and which may be required by Dermavale for the proper discharge of its obligations hereunder.

5.….

6. Termination

> *This Agreement shall continue until the conclusion of the obligations of the parties hereunder or until terminated by Dermavale:….*"

25. The First Schedule to the Biddencare Agreement set out the names of the Run-Off Companies who were parties to that Agreement and these included Dewey Warren Run-Off Limited, Derek Bryant Associates Inc and Derek Bryant Insurance Brokers Limited ("**Derek Bryant**"). I will refer in this judgment to Dewey Warren and Company Limited and Dewey Warren Run-Off Limited as "**Dewey Warren**".

26. The Biddencare Agreement was signed by Mr Webb on behalf of Dermavale and by Mr Nugent on behalf of Senator. Other signatories included Biddencare and Dewey Warren.

Lloyd's Brokers Byelaw

27. The Lloyd's Brokers Byelaw No 5 of 1988, 6 July 1988 ("**the Byelaw**"), which provided for the grant of permission to broke insurance business at Lloyd's, prohibited unregistered persons from broking insurance business at Lloyd's and set out the procedure for applications for registration, criteria for registration and conditions of registration, review and removal from the register. Paragraph 11(8) of the Byelaw was substituted by Lloyd's Brokers (Amendment No. 6) Byelaw (No 16 of 1992) with effect from 1 December 1992. As amended, the relevant parts of the Byelaw are as follows:

> "***4. Prohibition on unregistered persons broking insurance business at Lloyd's***
> *Subject to [paragraph 11(8) and (9),] paragraph 53, to the Umbrella Arrangements Byelaw (No. 6 of 1988, 107) and to any other byelaw made under section 8(3) of the Act by which underwriting members are permitted to accept or place business otherwise than from or through a Lloyd's broker, no person may broke insurance business at Lloyd's unless registered as a Lloyd's broker under this byelaw.*
>
> ***5. Applications for registration***
> *(1) Any…body corporate (including an existing Lloyd's broker) which wishes to be registered as a Lloyd's broker ("an applicant") may apply to the Council for its name to be entered in the register.*
> *….*
>
> ***7. Criteria for registration***
> *(1) An application shall not be registered as a Lloyd's broker unless the Council is satisfied that –*
> *…*
> *(b) (i) where the applicant is a body corporate, it is enrolled in the list maintained by the Insurance Brokers Registration Council under section 4 of the Insurance Brokers (Registration) Act 1977;*
>
> *…*
> *(2) In deciding whether an applicant is fit and proper to be a Lloyd's broker, the Council shall have regard to the following criteria -*

(a) the character and suitability of the directors (both individually and collectively) for the time being of….the applicant;
(b) the sufficiency in number of the directors of….the applicant whose principal occupation for the time being is, and of the directors…who have experience of, the conduct of business at Lloyd's (including the conduct of such business in the capacity of insurance broker);
(c) the reputation, character and suitability of any person who controls the applicant;
(d) the character and suitability of the compliance officer of the applicant;
(e) the adequacy of the capital of the applicant;
(f) whether the business of the applicant is or is likely to become unduly dependent on - (i) a particular insurer or insurers; (ii) a particular source or sources of business; (iii) a particular kind or kinds or description or descriptions of business; or (iv) a particular class or classes of insurance business specified in Schedule 2 to the Insurance Companies Act 1982;
(g) the ability and willingness of the applicant to supervise and service all of its activities and responsibilities and to account fully and properly for those activities;
(h) the location, adequacy and suitability of the staff of the applicant;
(i) the location of the accounting and other records of the applicant;
(j) any conditions imposed under paragraph 9; and
(k) any other matters which in the opinion of the Council should be taken into account in deciding whether an applicant is fit and proper to be a Lloyd's broker.

11. Removal from the register

…
(8) Notwithstanding that –
(a) the name of a partnership or body corporate is or has been removed from the register;
(b) the name of a partnership or body corporate is or has been removed from the list of existing Lloyd's brokers; or
(c) the name of a partnership or body corporate which is an existing Lloyd's broker has not been entered in the register by the end of the transitional period;
the Council may, if it considers that there is good reason to do so, and on such conditions and for such period as it thinks fit, permit –
…
(ii) any other person to broke insurance business at Lloyd's on behalf of or in connection with such…body corporate provided that such person has in the opinion of the Council adequate experience of dealing with the run-off of the insurance business of one or more Lloyd's brokers;
for the purpose only of discharging the continuing functions of an insurance broker in connection with –
(aa) insurance contracts effected or arranged by such partnership or body corporate;…
before (as the case may be) the date of such removal from the register or list or the expiry of the transitional period."

28. The Explanatory Note for the December 1992 amendment states that it:

"*has the effect of widening the category of persons which may be permitted access to the Room for the purpose of servicing the run-off of an ex-Lloyd's broker. It*

> *empowers the Council, where a partnership or body corporate ceases to be a Lloyd's broker, to permit: (i) that partnership or body corporate to continue to broke insurance business at Lloyd's or (ii) any other person to broke insurance business at Lloyd's on behalf of or in connection with that partnership or body corporate provided that such person has in the opinion of the Council adequate experience of dealing with the run-off of the insurance business of one or more Lloyd's brokers for the purpose only of servicing contracts effected, arranged or operated by that partnership or body corporate, or contracts in respect of which it had undertaken servicing obligations, before such cessation.*"

Senator's use of a Lloyd's insurance broker's code

29. In October 1992, the Lloyd's Insurance Brokers List included the following Pseudonym, Brokers Name, and Number: "*SEN - Derek Bryant Insurance Brokers Ltd (In Liquidation) – 450*". As identified at paragraph [25] above, Derek Bryant was one of the Run-Off Companies that was a party to the Biddencare Agreement.

30. The October 1992 and subsequent Lloyd's Insurance Brokers Lists (the parties produced one from October 1999 and another from January 2001) did not include any reference to the code SEN 450; that is neither the pseudonym nor the number.

31. An attendance note of a meeting between Equitas and Mr Nugent and Mr Webb on 10 January 1996 (which is further referred to at paragraph [43] below) noted that "*Senator has a Lloyd's broker number (450/SEN) which is in respect of run-off collections only. It operates outside the Central Accounting System and works on a pure cash basis by sending cheques to the agent.*"

32. A letter dated 10 October 1997 from Cork Gully Insolvency Practitioners to RHM Outhwaite Underwriters Limited refers to Senator under the heading "*Broker registration*" as follows: "*I understand Senator Consultants continue to use broker number 450 and pseudonym SEN, both originally assigned to* [Derek Bryant Insurance Brokers Limited (in compulsory liquidation)]. *Lloyd's are continuing to monitor the use of this number to ensure all monies passing through it relate to* [Derek Bryant Insurance Brokers Limited (in compulsory liquidation)] *or other Biddencare run-off companies business.*"

33. In 2001, the Lloyd's directory system is reported as picking up Senator as an "*Approved Run-Off Broker from 2001*".

34. On 11 February 2004, the Lloyd's Brokers List referred to Senator with number "450" and pseudonym "SEN" "*w.e.f. 01/04/03*". On that List, Dewey Warren with the number "720" and pseudonym "DWC" was stated to be in receivership.

35. On 10 August 2017, an email from Anne Glynn of Lloyd's to Mr Jim Gregory of Equitas stated that Senator had come up on the register as an "approved run-off broker".

Direct contracts between Senator and syndicates

36. On 22 December 1992, Senator was appointed directly by L.C. Taylor Syndicate to administer all claims and accounting matters regarding contracts originally placed by Dewey Warren.

37. On 16 April 1993, Senator was appointed directly by C.H. Bohling Syndicate to deal with the administration, accounting and claims collection of all contracts placed via intermediary brokers including Dewey Warren.

38. On 24 May 1994, Senator was appointed directly by Whittington Syndicate Management Limited to handle the administration and accounting of certain contracts originally placed with underwriters via intermediary brokers Dewey Warren.

39. On 27 June 1994, Senator was appointed directly by RC Barber Syndicate to handle the administration, claims collection and settlement via the Lloyd's Outwards Reinsurance System ("**LORS**") of all contracts placed with underwriters via intermediary brokers Derek Bryant.

40. On 17 November 1994, Senator was appointed directly by Gravett & Tilling underwriting agents to handle the administration and accounting of contracts originally placed with underwriters via intermediary brokers Dewey Warren.

41. On 20 October 1995, Senator was appointed directly by Whittington Syndicate Management Limited to handle the administration, accounting and claims collection of all contracts placed via Dewey Warrant in respect of ACH Ashby Syndicate.

Senator's efforts to provide its services directly to Equitas

42. On 1 December 1995, Senator wrote to Mr Michael Crall, Chief Executive of Equitas introducing its services and identifying how it might be of service to Equitas. The letter stated that:

> "*Senator has been active in the field of run-off administration for many years… In the recent survey on run-off services, in Reinsurance Magazine, Senator was ranked fourth….in the area of broker run-off…Traditionally run-off managers have sought to maximize investment income by retention of client funds, we have consciously set about building a reputation for providing a quick, aggressive collection service allied to an early release of funds to the client. This approach is often supported by a "no cure, no fee" contract with our client. On the direct collection side our clients frequently cite one of the following reasons for seeking an alternative means of collecting their insurance and reinsurance recoveries: -*
>
> ** The original placing broker has since gone into liquidation or receivership;….*"

43. Following a holding response sent on 11 December 1995, on 10 January 1996, a meeting took place between Equitas (represented by A.C. Pollard and R.D. Allen) and Senator (represented by Mr Webb and Mr Nugent). An attendance note was prepared by Mr Allen which concluded that Senator's level of experience was inadequate, it was too small to handle any real volumes of work, had no real systems and that there were doubts as to its future. Mr Allen's recommendation was "[t]*hat Senator be excluded from any involvement in Equitas operations*". The attendance note also stated that Senator "*were*

offering a (sic) collection services in respect of reinsurance recoveries" and "*currently handled certain broker runoff and acted for some Lloyd's syndicates*".

44. On an unknown date in 1996, as recorded in a letter from Senator to Equitas dated 12 December 1996, a meeting took place between Senator and Equitas (represented by Mr G. Wollaston) regarding outstanding balances for Sturge Syndicate contracts placed by Derek Bryant in which there was reference made to a potential recovery of USD 900,000. There was a document detailing potential recovery and a draft "Run-Off Agreement" attached to the 12 December 1996 letter. The latter defined "*Run-Off Service* "as follows: "*the service to be provided by Senator and includes, inter alia, the agreement and collection of claims on behalf of the Clients in respect of the business and payment of all collected funds to Equitas*". The "*Services To Be Rendered*" stated that Senator would:

> *"(a) investigate the current declared and paid position of the Business and prepare an accounting statement for Equitas demonstrating the outstanding position; and (b) collect all outstanding reinsurance recoveries due to the Clients on the business and remit those amounts due to Equitas.*"

The consideration comprised, inter alia, collection fees calculated at 10% of the funds remitted to Equitas on the Business from the date of Completion.

45. The wording of a draft letter to be sent out by Equitas to all insurers, reinsurers and intermediaries regarding Derek Bryant Insurance Brokers Limited stated as follows:

> "*We hereby advise you that we have appointed [Senator] to act on our behalf in all matters concerning the administration, accounting and claims collections with regard to the contracts detailed on the attached statement originally placed with reinsuring underwriters by Derek Bryant Insurance Brokers Limited*."

46. On 12 December 1996, Senator wrote to Equitas (Mr Wollaston) following up on the meeting and proposing further work in relation to the Sturge Syndicate. On the same date, Senator also wrote a further letter to Equitas pitching a proposal to create an inventory in relation to underwriter J. Gregory.

47. In April 1997, a draft "Collection Agreement" between Equitas and Senator was created. This document was presumably created by Senator but a copy of it was disclosed by Equitas in the proceedings. It referred to an agreement by Senator to provide "*certain advisory, collection and support services*". However, the relevant section defining the Services is obscured by a post-it note, save that the word "*fiduciary*" is apparent. There is no evidence that any such agreement was ever entered into between Equitas and Senator.

48. On 2 May 1997, Mr R Allen of Equitas wrote to Senator and, on 16 May 1997, Senator replied to Equitas referring to direct agreements with clients on a new basis of remuneration and also referring to a legal agreement entered into in 1992 pursuant to which Senator retained records of various brokers (including Dewey Warren).

49. On 20 October 1998, Equitas wrote to Senator in relation to the C.F. Palmer Syndicate and a letter sent by Senator dated 21 May 1998 to Whittington offering to collect reinsurance recoveries in relation to this syndicate. Equitas stated that it had decided that

certain syndicates with small reinsurance assets would be placed into 'cold storage' meaning that they will only be reviewed annually, and that Equitas would not be making any agreements which include collecting commission on recoveries from Lloyd's syndicates. Equitas stated that "*We are introducing processes which will result in intra Equitas settlements being accounted in house and not forming part of the Central Settlement scheme*".

50. On 28 March 1999, a meeting took place between Equitas and Senator. On 25 May 1999, Mr Nugent wrote to Equitas further to the March 1999 meeting setting out how Senator thought it could be of assistance to Equitas. Mr Nugent stated that he and Mr Webb had acquired the "Senator Group" in March 1992, and identified in Appendix 1 that Dewey Warren was one of the brokers of which Senator had acquired rights in 1992. At Appendix II, Mr Nugent set out the names of the syndicates with whom Senator had contracted to provide "*an ongoing broking service in respect of contracts placed by the Brokers*". It was pointed out that their policies now formed part of the Equitas portfolio. A note to Appendix II stated that Senator had identified recoveries but not yet secured an appointment by the Pateman Syndicate and C.F. Palmer Syndicate (amongst others that were named) and indicated that there may be other contracts upon which recoveries were due where Senator had not yet investigated the records. The letter enclosed at Appendix III a draft appointment letter in which Senator would act on behalf of Equitas "*in the recovery of any outstanding claims and accounting balances due to us from reinsuring underwriters in respect of any of the Syndicates and contracts listed in the appendix to this letter*". The draft appointment letter provided for Senator to transfer to Equitas all amounts in excess of £10,000 (or currency equivalent) within 7 days of funds clearing Senator's bank account. The proposed appointment was to be on the basis of a fee, the rate for which was not specified. A curriculum vitae ("**CV**") for Mr Nugent was also attached to the 25 May 1999 letter. In this, he referred to Senator as "*a major player in its chosen market of out-sourced Lloyd's Broker run-off*" and as having "*developed its run-off business*". A further CV for Mr Webb referred to Senator as managing the run-off of various reinsurance brokers including Dewey Warren.

51. On 2 June 1999, Equitas replied stating it was "*not in a position to take up [Senator's] proposal*" at that time.

52. On 17 January 2000, Senator sought payment from Equitas due under its retainer with the C.H. Bohling Syndicate (with whom, as identified at paragraph [37] above, it had a direct contract).

53. On 21 August 2001, Equitas wrote to various underwriting management pools regarding outstanding balances on reinsurance contracts, one of which was the Pateman contract. On 5 September 2001, Senator replied to Equitas' letter dated 21 August 2001 seeking an analysis of the balances in question and requesting a meeting to discuss the collection of outstanding receivables. On 12 September 2001, Equitas replied to Senator stating it "*will address this situation with PRO directly at the moment, therefore it is not necessary to provide you with additional information at this stage*" and that a meeting would not be appropriate.

54. A brochure produced in about 2005 (according to the Defendants' disclosure statement) or about 2007 (according to Mr Nugent's oral evidence) relating to "The Senator Group"

referred to Senator as "*the London Market's longest established broker run-off organisation whose principal activities include: -*

- *The Run-off of Lloyd's and Non-Lloyd's brokers*
- *Claims administration*
- *Outwards reinsurance collections*
- *Loss reviews*
- *Expert fee collections*
- *Commutation negotiations*
- *Subrogation actions*"

and further stated that "*We are authorised by Lloyd's to transact run-off business in the room through our own broker number*".

Investigation by Equitas into the Defendants

55. In late 2002/early 2003, Equitas requested the "LORS 2002/2003 Download" from Xchanging, which is a provider of policy administration services to the London reinsurance market, in connection with a different project. The LORS data contained all transactions between Lloyd's syndicates and brokers between 1982 and May 2002 (being more than 11 million records).

56. In an email dated 26 July 2005, Mr John Marsland ("**Mr Marsland**") of Resolute Management Services Limited (formerly Equitas Management Services Limited) ("**Resolute**") asked Mr Langley (then of the Seventh Defendant) to produce certain files.

57. In 2006, Equitas received a partial download of the "CLASS 2006 Download" from Xchanging for the purposes of an unrelated project. "**CLASS**" stands for "Claims Loss Advice and Settlement System". The CLASS data related to transactions between the company market and brokers.

58. In a letter dated 31 July 2006 from Mr Michael O'Brien ("**Mr O'Brien**") of Equitas to Mr Webb of Senator, Mr O'Brien notified Mr Webb that Equitas was the owner of a 'reinsurance asset' previously owned by L.C. Taylor Syndicates 527/379 and placed by Dewey Warren, and sought production of the relevant documents within 14 days with the threat of legal proceedings if not produced. Mr Webb responded in a letter dated 9 August 2006 stating that progress had been made in "*assembling the LC Taylor files held in archives*". A further undated letter from Equitas to Senator requested that Senator provide all files, slips and other relevant documentation to Equitas in relation to an attached schedule.

59. On 25 August 2006, Senator provided the terms on which it would provide the LC Taylor files to Equitas and provided them on or around 17 October 2006. Equitas signed for the files transferred on 23 November 2006. The terms provided that with effect from the date of transfer of the files, Equitas would be responsible for the collection from and/or payment to reinsuring underwriters of all claims or premiums outstanding as at the date of the transfer of the files as well as all future claims or premiums as at the date of the transfer of the files, would formally write to reinsuring underwriters confirming that Equitas assumed ongoing responsibility from the date of transfer for all matters concerning the files being transferred, and that it would notify Senator of any allegations,

claims or actions of any nature whatsoever, which may be made against Senator in respect of any alleged act, error or omission by Senator directly or indirectly relating to the files being transferred.

60. On 3 January 2007, Senator provided Equitas with files relating to various further syndicates, including C.H. Bohling and M.A. Gravett, which Equitas accepted on the same terms as previously. On 26 February 2007, Senator provided Equitas with files relating to Derek Bryant Insurance Brokers Limited which Equitas again accepted on the same terms as previously. On 21 March 2007, Senator provided Equitas with files relating to Derek Bryant Stock & Co Ltd which Equitas again accepted on the same terms as previously.

61. On 11 April 2007, an email from Rhydian Williams of Resolute to Jeremy Heap (who I was told in argument was also at Resolute) with the subject "Biddencare" referred to the fact that "*PwC have been trying to close the Biddencare broker estate for some time*" noting it was in liquidation and could only be closed by a deed.

62. In 2008, Equitas approached Xchanging to request a download of all the Lloyd's Policy Signing Office ("**LPSO**") premium and claims data held in respect of the 1992 and prior years of account. The LPSO data related to transactions between Lloyd's reinsurers and brokers.

63. In 2009, Equitas requested the "NRG Victory Contract Download" data and received this in March 2009, thereafter, requesting the "NRG Victory Cheque Download".

64. On or shortly after 26 March 2009, Senator agreed to provide to Equitas files relating to Dewey Warren, including files and slips relating to the Pateman Syndicate.

65. As stated at paragraph [16] above, Mr Webb retired from the Senator Group from 14 September 2009.

66. In 2010, Equitas received the data it had requested from Xchanging in 2008 (all LPSO transactions from 1983 to November 2008 (being more than 12 million records)). In February 2010, NRG Victory granted Equitas authority to contact Xchanging to request access to the "NRG Victory CLASS" data (being data from the Institute of London Underwriters ("**ILU**") and the London International Insurance and Reinsurance Market Association ("**LIRMA**") for any contract in which NRG Victory participated).

67. On 15 June 2010 specific enquiries were made by Equitas of Senator relating to Dewey Warren brokered transactions stating as follows:

> "*The attached ILU signing would appear to have been collected by Senator but not paid on to us yet. If it has been paid to us, according to your records can you let us have the LORS signing numbers and dates please*."

The email attached an Xchanging claims enquiry that related to the Pateman Syndicate claims which included some claims that are the subject of these proceedings and identified at paragraphs 19(1)-(3) of the Amended Particulars of Claim dated 1 November 2019.

68. In an email dated 12 July 2010 from Mr Langley (Senator) to Mr Marsland (Resolute), Mr Langley apologised for the delay and stated that "Peter" (whom he clarified in evidence referred to Mr Peter Saltiel) was investigating this but was ill at present and asked if there were claims for other brokers that were being "*run-off by Senator*". Mr Marsland responded the same day saying he was "*not actually sure what other brokers are in your stable*". On 27 September 2010, Mr Langley emailed Mr Marsland relating to a pending meeting stating:

> "*Please rest assured that I'm making every effort to finalise this work as a matter of utmost urgency for not only will it enable us to finalise this legacy business with you it will enable us to remove 000's of open item items from our ledgers, significantly reduce our debtor and creditor balances and transfer a significant number of claims files from our storage. I just can't say right now exactly when it will happen but it WILL happen in October sooner rather than later.*"

On 13 July 2010, Mr Marsland emailed Mr Langley relating to whether or not Mr Marsland had any monies for various entities including Dewey Warren.

69. In April 2011, Equitas received the "NRG Victory Cheque Download".

70. On 19 April 2011, Mr Marsland sent an internal email to Mr Davey relating to a balance due from Senator in respect of reference 85A 067 (relating to the Pateman Syndicate) stating:

> "*26.52% of settlements 3, 4 and 5 according to MAX. About $65k and £8k. Feel now as though I should have been more proactive on this*."

71. In May 2011, Mr Webb who, following retirement from the Senator Group, was now seeking to enter into a service agreement with Equitas sought advice from a firm of solicitors, Charles Russell LLP, advice which he then disclosed to Equitas. His email dated 12 May 2011 to his solicitor stated as follows:

> "*I had a meeting yesterday with a prospective client, Resolute Management Services Limited, who is interested in engaging my services but their Group General Counsel, Howard Kaye is concerned by the working of this section* [of a confidentiality clause in Mr Webb's agreement with Senator]. *I will explain as follows:*
>
> *Whilst in the employ of Senator I arranged for the transfer of various insurance files to Resolute. By utilising my knowledge and expertise they would like me to review the transferred files along with other files in their organisation in order to ascertain whether there are any outstanding funds due to Resolute. Let me say at this stage that in accordance with clause 8.3 of the agreement I do not hold any confidential information in paper form, on a computer or on discs. Obviously I cannot delete information held in my brain. The problem that Resolute has and indeed probably affects me most of all is with the wording of clause 8.2 in that, briefly, "the seller shall not use or disclose to any person, firm or company any confidential information".*

> *Needless to say that if I were to review the transferred files I would by past knowledge recognise those files and in the process of auditing the files I would recognise on discovery that in certain instances funds have been recovered by Senator and not passed on to Resolute. By bringing such information to the attention of Resolute am I in breach of the section to which I have referred?*
>
> *Similarly, the same question arises if I was engaged by an old client of Senator to assume responsibility for the recovery of funds due to that client; took control of files held by Senator and then discovered that funds previously collected by them had not been passed on to my client.*
>
> *The problem I have is that I cannot dismiss certain knowledge held in my brain concerning instances of funds being collected whilst I was employed by Senator and not being passed on for whatever reason. These funds are due to the respective clients and are not the property of Senator….*"

72. On 1 November 2012, Mr Marsland sent a chasing email to Mr Langley asking for a reply to the 15 June 2010 email. He sent a further email on the same date stating that Dewey Warren was the original broker. On 1 November 2012, Mr Langley replied stating "*I will investigate this further*".

73. In 2014, Senator moved offices and Mr Nugent's evidence is that a number of files were probably disposed of in the move.

74. On 28 January 2014, Mr Marsland emailed Mr Langley regarding payments collected by Senator but not remitted to Equitas relating to the Pateman Syndicate. He enclosed LORS extracts relating to what had been paid and what was unpaid. On 23 February 2014, Mr Langley replied stating "*thanks for your continued patience for a little while longer….rest assured I'll contact you again very shortly*". On 24 February 2014, Mr Marsland responded to Mr Langley saying he "*would hope to hear from you this week*".

75. On 2 July 2014, Mr Marsland emailed Mr Langley regarding the 28 January 2014 email stating that he now had the file and some more documentation for "85A 067" (relating to the Pateman Syndicate) and invited Mr Langley to pop over sometime to have a look and catch up. On 4 August 2014, Mr Marsland emailed Mr Langley asking "*Any news/update for us please?*". On 15 August 2014, according to Mr Piller's evidence and some emails dated 14 August 2014 seeking to set up a meeting, it would appear that a meeting took place between Mr Davey and Mr Marsland (both Equitas) and Mr Langley to discuss the outstanding payments.

76. On 17 February 2015, an internal Equitas email from Karen Amos to Phil Davey referred to Senator stating:

> "*Senator to look at Dewey Warren/Nasco/Derek Bryant balances next. DB $192k but offered $40k. Broker has no cash.*"

77. In July 2015, Mr Jim Gregory took over from Mr Marsland at Resolute.

78. In late July 2015, a meeting took place between Equitas and Senator. No attendance note is available relating to that meeting. On 8 September 2015 Mr Gregory emailed Mr

Nugent (copied to Mr Langley and Mr Davey) regarding Senator's position that any claims to unpaid funds were time-barred. On 17 November 2015, Mr Nugent emailed Mr Gregory setting out why Senator stated that any claims were statute-barred. On 24 November 2015, Mr Gregory emailed Mr Nugent requesting details of Senator's appointment as a debt collector together with contractual documents. On 2 December 2015, Mr Nugent emailed Mr Gregory (copied to Mr Langley and Mr Davey) stating that Senator's role was to collect reinsurance recoveries on a contingent fee arrangement. On 15 December 2015, Equitas responded challenging the assertion that Senator was not a broker and acted merely as a "debt collector".

79. On 10 August 2017, Mr Gregory emailed Mr Nugent (copied to Mr Langley) requesting a response to the 15 December 2015 email. It does not appear that any response was given to Mr Gregory's email.

Lead up to issue of the claim

80. In 2018, Mr Steven Hull of Equitas approached Mr Luben, who was at that time working for Equitas, and asked him to review a Senator contract.

81. On 8 February 2018 Mr Hull emailed Mr Luben and Mr Davey asking "*Do we have a schedule of the of the (sic) alleged balances due from Senator, namely £20,000 and $164,000 in respect of Derek Bryant, Nasco & Dewey Warren accounts?*" He forwarded Mr Marsland's email dated 19 April 2011 (see paragraph [70] above) and stated "*I found reference to a balance on Dewey Warrant below, but nothing more – I believe we received downloads from Senator sometime in 2014, which confirmed our suspicion that funds were due. Do you have access to John Marsland's old emails for 2014 onwards on Senator?*"

82. Mr Piller's evidence is that the decision to do this review was prompted by information from a party who was previously associated with Senator. Equitas's counsel, Mr Benzie, indicated during submissions that that information may have come from Mr Webb. In any event, the information resulted in the investigation that eventually resulted in the discovery that sums had allegedly been collected by Senator on behalf of the Pateman Syndicate in relation to the Japan Airlines claim.

83. On 26 February 2018, Mr Luben requested from Xchanging Associated Transaction data for CLASS data, which was provided the same day.

84. Mr Piller's evidence is that he identified that Senator, using broker code 450 SEN, had collected amounts in relation to the Pateman Syndicate that had not been paid to the Syndicate/Equitas. It was the discovery of these sums that led to Equitas issuing proceedings against the Defendants on 17 January 2019.

85. Following the issue of proceedings, Mr Luben carried out further work and identified that additional amounts were due in relation to the Cotesworth Syndicate and those amounts were added to the claim by amendment in late 2019.

Equitas Limited & another v Walsham Brothers & Co Ltd

86. Equitas relies heavily on the judgment of Males J (as he then was) in *Equitas Ltd & anr v Walsham Brothers & Co Ltd* [2013] EWHC 3264 (Comm); [2014] Lloyd's Rep 398 ("***Walsham***") where Equitas was successful in a claim against Walsham Brothers & Co Limited, who were (undisputedly) a Lloyd's broker for money received from reinsurers in settlement of claims and by way of return of premium which had not been paid over to Equitas. In that case, as in the present one, it was common ground that Equitas was the assignee of any claims against Walsham. By a letter dated 18 July 2002, DAC, solicitors for Equitas, wrote a letter to Walsham seeking to confirm what had been agreed after a lengthy period of negotiation ("**DAC letter**"). The letter asked Walsham to confirm that all identifiable balances had been paid and that all appropriate efforts would be made to identify unpaid items. The letter than stated that Walsham was under a "*continuing duty*", inter alia, "*to pay…without delay all amounts you have received and still hold on behalf of Lloyd's syndicates for 1992 and prior years of account and/or Equitas"*. Walsham returned a signed copy of the letter confirming its agreement to those terms. On 17 September 2003, Walsham's role as broker to the syndicates was effectively ended by the execution of a Broker Transfer Agreement ("**Broker Transfer Agreement**"), the purpose of which was for "*Equitas, acting on behalf of the Syndicates….to assume control of the ongoing functions performed by Walsham's in relation to the Reinsurance Agreements*". In those proceedings, Equitas sought to recover funds held by Walsham Brothers & Co Limited, and argued that the broker was under a continuing duty to remit those funds so that the claims were not time-barred. Walsham denied that there was a continuing duty but rather a single absolute obligation which accrued once and for all when it failed to remit the funds.

87. Insofar as is relevant to the present case, the determinations made by Males J were as follows:

(1) In light of the agreed evidence of the broking experts, the duties owed by Lloyd's brokers were as follows (i) to collect reasonably promptly from the reinsured and pay reasonably promptly to the reinsurers all premiums, net of any applicable brokerage (and claim refunds); (ii) to notify the reinsurers reasonably promptly of any potential claims advised by the reinsured and to notify the reinsured reasonably promptly of any questions raised by the reinsurers; (iii) to collect reasonably promptly from the reinsurers all valid claims (and returns of premium) and pay them reasonably promptly to the reinsured; and (iv) to administer the reinsurance contract in a professional and business-like manner including the maintenance and preservation of proper and adequate records and providing the relevant records, or copies thereof, to the reinsured and/or to the reinsurers if requested ([47-48]);
(2) The broker's contractual and restitutionary duty to remit funds reasonably promptly was probably best regarded as an absolute duty and not merely a duty to exercise due diligence. However, a broker was performing a contract for the supply of a service and there was a statutory implied term under section 13 of the Supply of Goods and Services Act 1982 that it would be carried out with reasonable care and skill. A broker owed a duty of reasonable care to maintain proper and adequate records ([49, 51 and 52]);
(3) A broker also owed a duty of care in tort to exercise reasonable skill and care to remit funds promptly ([57-58]);
(4) Walsham Brothers & Co Limited's obligation to remit the funds to the syndicates was a continuing obligation. That meant that, for limitation purposes,

there was in principle, a fresh cause of action accruing each day when those funds were not paid over ([78]). The parties relationship was a long-term continuing relationship in which the broker's role in collecting and remitting funds was central; in which reinsurance claims would be expected to come in and needed to be dealt with over a period of years; with the broker under a continuing obligation to maintain accounts and administer the syndicates' reinsurance policies generally; and with heavy reliance known to be placed on the broker by the syndicates. The broker's obligation in essence was to administer the syndicates' accounts in a manner which ensured that the syndicates would not be kept out of funds to which they were entitled ([68, 69, 71]). If that was wrong, then the DAC letter referred to Walsham being "*under a continuing duty*" with regard to remittance of funds whether received in the past or the future, a proposition which Walsham Brothers & Co Limited had accepted by a formal signature which was requested and given expressly on the basis that it would avoid the need for litigation. At that point the parties agreed to treat the duties as continuing ([73-74]). A similar point arose by reference to the provisions of the Broker Transfer Agreement dated 17 September 2003, which provided that Walsham Brothers & Co Limited had continuing duties as regards all funds received in respect of the Reinsurance Agreements irrespective of date ([75-76]);

(5) Following Reconstruction and Renewal, Walsham Brothers & Co Limited owed to Equitas the same duties as it had previously owed to the syndicates ([85, 87, 93, 99, 100]);

(6) It was common ground that Equitas in principle had a claim in restitution against Walsham Brothers & Co Limited ([134]).

88. The Defendants have highlighted various differences between the *Walsham* case and the circumstances of the current claim. I will address these where relevant to the issues below.

Common ground

89. There was no dispute between the parties as to the following:

(1) The identity of Equitas, and that they have title to sue as assignee of all rights, title and interest of all Lloyd's Syndicates in respect of all non-life liabilities under contracts of insurance, reinsurance and retrocession underwritten by the Syndicates and allocated to their 1992 and prior years of account;

(2) The identity of the Defendants, and the fact that as of early January 2019 they were all in the "Senator Group";

(3) That certain claims were due to the Syndicates, whose rights have been assigned to Equitas. The ILU Reinsurers paid to the Defendants (on the Defendants' case, Senator only) the sums pleaded as due and owing from them to the Syndicates.

90. Further, it was accepted by Equitas at the trial that there was in fact no evidence of any Defendant other than Senator collecting the monies alleged to be due to the Pateman and Cotesworth Syndicates or Equitas. Sande Investments, Dermavale and Senator Insurance Holdings continue to be the subject of the claim on the basis that they may subsequently

have received monies due to the Pateman and Cotesworth Syndicates or Equitas. There being no evidence in existence that the other Defendants had either collected or received any monies due to those Syndicates/Equitas, Equitas consented to the entry of judgment in their favour.

The issues for determination

91. The parties submitted that the following issues arise for determination:

(1) What was the role of Senator at the material times in relation to the receipt of monies? Was its role merely that of providing a 'debt collection service' or did it also provide the services of an insurance/reinsurance broker? How and in what circumstances, if any, did Senator make use of the broker code '450 SEN' in collecting sums from other market participants? Was Senator subject to any of the requirements and responsibilities set out in the Code of Practice for Lloyd's brokers?

(2) What duties, if any, were owed by Senator to the relevant Syndicates and/or Equitas? Specifically:

(a) Did an implied contract of retainer come into being between Equitas/the Syndicates and Senator? If so, did it include implied terms requiring Senator to:

i. make all appropriate efforts to identify any amounts received and/or held by them that were payable to the Syndicates and/or Equitas in connection with the Outwards Protections;

ii. inform the relevant Syndicates and/or Equitas promptly of any amounts received and/or held by them that were payable to the Syndicates and/or Equitas in connection with the Outwards Protections;

iii. pay any such amounts promptly to the relevant Syndicates and/or Equitas;

iv. use the reasonable skill and care of a professional and experienced Lloyd's broker and/or reinsurance agent when performing their duties;

v. account to the relevant Syndicates and/or Equitas in respect of all amounts received and/or held by them that were payable to the relevant Syndicates and/or Claimants in connection with the Outwards Protections?

(b) Did Senator assume responsibility to the Syndicates and/or Equitas regarding the prompt payment of sums received on their behalf in connection with the Outwards Protections such that they owed any of the duties set out above at common law to the Syndicates and/or Equitas?

(c) Did Senator owe fiduciary duties to account to the Syndicates and/or Equitas for amounts received in connection with the Outwards Protections?

(d) What was the status of sums received by Senator? Did it hold them on behalf of the Syndicates and/or Equitas, and what legal duties, if any, did it owe in relation to their remission?

(3) Was Senator in breach of the aforesaid duties? In particular:

(a) Were the sums set out in paragraphs 19 and 20A of the Amended Particulars of Claim received by Senator (to the extent not already admitted)?
(b) If so, were those sums remitted to Equitas?
(c) If not, when should those sums have been remitted?

(4) If any such sums were received by any of the Defendants and not remitted to Equitas, are any of the Defendants liable to pay compensatory damages to Equitas for lost investment income that would have been earned had such sums been remitted promptly? If so, what is the quantum of those damages?
(5) Are any of the Defendants liable in the law of restitution to Equitas in respect of any of the sums alleged to have been received by them but not remitted? If so, what is the quantum of that liability?
(6) Is Equitas entitled to claim an account in respect of all interest, profits, and/or other sums received by the Defendants in respect of sums that should have been remitted?
(7) Is Equitas entitled to the remedy of a general account?
(8) Are any of the claims statute-barred? In particular:
(a) Are Equitas' claims barred under sections 2 and/or 5 of the Limitation Act 1980?
(b) Are or were the obligations of the Defendants to remit outstanding amounts continuing obligations? If so, for how long did those obligations continue?
(c) Is Equitas entitled to rely on sections 32(1)(b) and 32(2) of the Limitation Act 1980? Was there a deliberate concealment of the facts relevant to its rights of action? If so when should the Claimants have discovered that concealment with reasonable diligence?
(d) Is Equitas entitled to rely on s.21(1)(b) of the Limitation Act 1980?
(e) Are Equitas' claims for an account barred by s.23 of the Limitation Act 1980?
(f) Are any of Equitas' claims barred by laches?
(9) Is Equitas entitled to interest and if so, in what amount?

I shall address the above issues (insofar as they arise in light of my determinations) in the following order below. I will start by considering and determining the role of Senator and then turn to the various legal bases on which it is contended that Senator and/or the other remaining Defendants are liable to Equitas (i.e. contract, tort, fiduciary duty and restitution), then consider the issue of breach, then limitation (including continuing obligations, section 32 and section 21 of the Limitation Act 1980) and finally remedies.

The evidence

92. Equitas called evidence from the following witnesses:

(1) Mr David Luben, a forensic investigator who worked for Equitas from 2001 until 30 June 2019.
(2) Mr Christopher Piller, currently the Worldwide Reinsurance Claims Manager at Resolute Management Services Limited (formerly called Equitas Management Services Limited). He joined Equitas in 1997 and remains employed by them.

(3) Mr Colin Braithwaite, a Claim Technician at Equitas from 1996 until the present.

93. A witness statement was provided by Mr Thomas Mungovan, a solicitor at DWF LLP, who gave evidence about a conversation with the Defendants' expert witness. He was not required to give oral evidence and his evidence is not relevant to the matters I have to decide.

94. The Defendants called evidence from the following witnesses:
(1) Mr Paul Nugent, director of all 9 Defendants.
(2) Mr Colin Langley, director of Senator (and the Seventh and Eight Defendants).
(3) Mr Mark Lewis, Head of Reinsurance & Credit Control at Ashbrooke Financial Group Limited

95. Neither party called Mr. Webb to give evidence. This is surprising given that Mr Webb was (according to the evidence of Mr Nugent and this would appear to be supported by the documentary evidence) the director of the Senator in practice responsible for Senator's collections and any remittances to the Syndicates/Equitas during the relevant period (1998 to 2004 for the collections, and Mr Webb remained a director until September 2009). The Defendants' position was that the relationship with Mr Webb remained amicable but that he did not wish to provide a witness statement. Equitas appears to have commenced the claim in light of information provided by Mr Webb (though his motives for providing this are unclear given that he did not secure any engagement with Equitas/Resolute after leaving Senator, and such information would effectively have been in relation to his own failure to ensure that Senator remitted monies collected to the Syndicates/Equitas). However, Equitas did not call him to give evidence either, by witness summons or otherwise.

96. Further, there was no evidence called by Equitas from any representative of the Pateman or Cotesworth Syndicates as to their knowledge of or dealings with Senator; or the relevant reinsurers from whom Senator made the relevant collections.

97. Expert evidence was given by Mr Julian Burling (on behalf of Equitas) and Mr Michael Bowmer (on behalf of the Defendants).

Role of Senator

98. Since it underlies a number of the issues raised for determination, I will start by addressing the role of Senator in relation to the transactions in question.

99. Equitas accepts that Senator was not a Lloyd's broker "*in the strict sense*" since the role of a Lloyd's broker includes the placing of new business on behalf of its clients. It accepts that Senator was not placing new business. However, Equitas alleges that Senator was a "*run-off broker*" at all times from (at least) 1991 onwards. Reliance is placed on Mr Bowmer's acceptance that the concept of a "*run-off broker*" was recognised within the market in the 1990s, noting that "*[E]xcept for placing new business, they would be doing the same thing as a conventional Lloyd's broker*".

100. Equitas' case is that, at all material times, Senator was a run-off broker in that it performed all the functions of a run-off broker, promoted itself as a run-off broker and was perceived in the market as a run-off broker, relying on the following matters:

(1) Mr Nugent's acceptance in evidence that Senator performed all the functions of a run-off broker;
(2) Mr Nugent's acceptance that Senator was "*handling the run-off of brokers in their entirety*" from 1991 to 1992;
(3) Mr Nugent's response that Senator "*was operating in the broker space*";
(4) Mr Webb's description of his role on his CV as at May 1999 as encompassing the "*run-off*" of the brokers listed in the Biddencare Agreement;
(5) Mr Nugent's CV, again as at May 1999, referring to Senator being a major player in its chosen market of "*out-sourced Lloyd's Broker run-off*" and having developed "*its run-off business*";
(6) The fact that Senator marketed itself to Equitas and the market more generally as a run-off broker (by reference to Senator's letter to Mr Crall dated 1 December 1995 at paragraph [42] above, the minute of the meeting dated 10 January 1996 at paragraph [43] above, the wording of the draft "*Run-Off Agreement*" and draft letter to be sent out at paragraphs [44-45] above; the draft "*Collection Agreement*" where the services offered by Senator are obscured by a post-it note but include the word "*fiduciary*" at paragraph [47] above, and the Senator brochure produced in 2005 or 2007 at paragraph [54] above);
(7) Senator's use of the broker code 450 SEN which was used to access and use the Lloyd's accounting systems and Mr Bowmer's evidence that to obtain a code somebody at LPSO would have needed instructions from somebody and "*would not have just done it for a friend*";
(8) The fact that Mr Webb had a Lloyd's pass and accessed the Room and Mr Nugent accepted that Mr Webb spoke to underwriters about claims relating to the brokers with which he was dealing;
(9) The fact that Senator was engaged in run-off was confirmed by Mr Burling who was a market participant until 1995 that "*as far as I am aware Senator, Enigma, whatever you want to call them, were doing run-off work for Lloyd's – for, shall we say, almost defunct Lloyd's [brokers]"*;
(10) That the only provision of the Lloyd's Byelaw identified that would have allowed Senator to transact business at Lloyd's in relation to run-off was the new paragraph 11(8) that was inserted into the Byelaw (Lloyd's Brokers (Amendment No. 6) Byelaw) that allowed "*other persons to broke insurance business at Lloyds*" (see Explanatory Note subparagraph (ii)) for the purposes of servicing the run-off of an ex-Lloyd's broker. Equitas contends that as such, in the view of Lloyd's the servicing of an ex-Lloyd's broker in run-off does involve the broking of insurance business (as was accepted by Mr Bowmer in his evidence);
(11) The fact that Senator was an "approved run-off broker" from 2001 and was registered with Lloyd's in the 1990s, and Mr Nugent's acceptance that it was unlikely that Lloyd's would unilaterally appoint a debt collector as an approved run-off broker.

101. The Defendants case is that Senator was never a Lloyd's broker for the following reasons:

(1) There is no evidence of it having applied for registration as a Lloyd's broker under paragraph 5 of the Byelaw;
(2) There is no evidence of it having been enrolled in the Lists maintained by the Insurance Brokers Registration Council ("**IRBC**") as required under paragraph 7(1)(b)(i) of the Byelaw;
(3) There is no evidence of it having been required to maintain or to have maintained any insurance broking account ("**IBA**"), an essential requirement for any Lloyd's broker;
(4) There is no evidence of Senator having ever been required to give or having given a Trust Deed, an essential requirement for any Lloyd's broker, as confirmed by both experts in their evidence; and
(5) There is no evidence of Senator having ever been required to comply with the Code of Practice for Lloyd's brokers.

102. It is further contended that the evidence does not support Senator ever having held itself out as a "Lloyds broker" because:

(1) The use of a broker code did not signify that it was a broker;
(2) At the relevant time, Senator's name included "*consultant*" not "*broker*";
(3) In the Biddencare Agreement, Senator is not described or referred to as a "*broker*";
(4) The letters from Senator to reinsurers did not describe or refer to Senator as a "*broker*" and stated "*We enclose herewith claims collection documents*", indicative of Senator's role;
(5) Senator's "*Claim Collection Forms*" did not refer to itself as a broker;
(6) Senator's "*Reinstatement Premium Calculations*" did not refer to itself as a broker;
(7) Even when appointed directly by syndicates, the appointment letters often referred to the appointment being to "*administer all claims*" and the letter did not describe or refer to Senator as a "*broker*" whereas other entities (not Senator) were described as a "*broker*"**.** The same letters identified remuneration based upon "*balances settled*" by way of collections, or "*claims collected*". Related notices of appointments to reinsurers referred to Senator acting "*in all matters concerning the administration, accounting and claims collection*";
(8) Equitas's own document shows that by January 1996 Equitas knew that Senator offering was "*collection services in respect of reinsurance recoveries*" (see paragraph [43] above.

103. It is still further contended that the evidence does not support Senator ever having been understood to have been a "Lloyd's broker" because:

(1) Mr Nugent's evidence was that Mr Webb was a visitor to the Room who did not have a broker's ticket;
(2) No person who dealt with Senator has been called to give evidence of any contemporary misunderstanding;
(3) Mr Pillar's evidence is that Mr Webb was well-known in the market. However, Mr Webb's 1999 CV does not show him to have been a broker, and insofar as anything material can be drawn from the CV, reinsurers are unlikely to have seen him as a broker;

(4) The experts declined to speculate about what market participants would have understood about the nature of services Senator was offering;
(5) SEN 450 was an access code for the purposes of processing business;
(6) The experts agreed in their joint statement as to the exhaustive categories of persons to whom the LPSO would in practice have issued LPSO broker numbers. An entity using the SEN 450 code did not have to be placing business;
(7) Accordingly SEN 450 did not signify that the entity was necessarily a Lloyd's broker. It could be a Lloyd's broker. It could be a Byelaw paragraph 11(8)(ii) entity. Or it could be neither of the above, including an entity making collections. Mr Burling accepted as much in his evidence;
(8) In any event, if one wanted to know whether an entity was or was not a Lloyd's broker the places to find out were the IDRC list (and there is no suggestion that Senator ever appeared on that); and the Lloyd's list - and Senator did not appear on the list between 1993 and 2004.

104. I turn to my determination of this issue. It is common ground that Senator was not placing new business and was not therefore a full Lloyd's broker. Whilst the concept of a "*run-off broker*" was, according to the expert evidence, recognised in the 1990s, the evidence before me does not disclose any clear and accepted market understanding of the precise scope of such broker's regulatory obligations.

105. I find that Senator was engaging in some, or even most, but not necessarily all of the services or functions of a broker engaged in run-off. In relation to those syndicates with whom it had a direct contract, its role was determined by those contractual terms. In relation to its activities pursuant to the Biddencare Agreement, which is relevant to the claims here given there was no direct contract with the Pateman/Cotesworth Syndicates or Equitas, its activities were governed by the terms of that agreement set out at paragraphs [23-25] above. It was reviewing and sorting out files and records, identifying amounts due from debtors of the Run-Off Companies debts that had not been collected, collecting claims from both Lloyd's reinsurers and the companies market where it considered it reasonably practicable and economically prudent and its contractual duty was (which, according to the evidence, was complied with at least in some cases) to apply each amount so collected in settlement of the amount due to the syndicates.

106. There is, however, no evidence before me that Senator ever applied for registration as a Lloyd's broker or was assessed by the Council of Lloyd's by reference to the criteria set out in the Byelaw. There is no evidence that it was ever required to sign a Trust Deed or maintain an IBA, as would be the case for a Lloyd's broker. Senator does not appear to have been enrolled on the IBRC list and did not appear on the Lloyd's list between 1993 and 2004, which includes the period relevant to the present claims (being collections made between 1998 to 2004).

107. Whilst there is no evidence of any specific approval, on the basis that it seems to have been the only way in which Senator could properly have collected reinsurance recoveries through the Lloyd's systems in the way it did, I find that Senator probably was an "*other person*" permitted to broke insurance business at Lloyd's to deal with the run-off of the insurance business of one or more Lloyd's brokers for the purpose of discharging the continuing functions of that broker in connection with insurance contracts it had effected or arranged within paragraph 11(8)(ii) of the Byelaw. However, even if this was the case, there is no evidence that this in itself made Senator a "Lloyd's broker" as opposed to an

"*other person*" (i.e. an entity other than a Lloyd's broker) permitted to carry out certain insurance broking functions on behalf of a former Lloyd's broker.

108. Further, there is no evidence before me that having permission to carry out certain insurance broking functions on behalf of a former Lloyd's broker within paragraph 11(8)(ii) of the Byelaw made Senator subject to the Lloyd's Code of Practice for Lloyd's Brokers which was in force from 1 November 1988. The Code of Practice, which was agreed to be applicable in *Walsham* but whose applicability is disputed in the present case stated as follows:

> "*7. Accounting*
> *7.1. At an early stage in the business relationship, a Lloyd's broker should advise a client of his obligations to the Lloyd's broker and insurers concerning the timely payment of premiums.*
> *7.2. Any insurance monies handled by a Lloyd's broker have to be kept in Insurance Broking Accounts. The operation of these accounts is the responsibility of the Lloyd's broker and he receives and retains any interest or investment income earned on them. A Lloyd's broker should apply due diligence to the collection and payment of all insurance monies.*
> *7.3 A Lloyd's broker should have proper regard for the settlement due date agreed with the insurers for any contract of insurance.*
> *7.4 A Lloyd's broker should remit money received and due to clients promptly. Where a risk is placed with a number of insurers, and claims monies are remitted to the Lloyd's broker at different times, the Lloyd's broker will need to consider whether, having regard to the amount received and the time when the balance will be received, and any other relevant factors such as amounts owed by the client to the Lloyd's broker, he should pass on to the client such proceeds, as he has received as soon as possible, rather than await the balance and make payment in full.*"

109. The Code of Practice on its face is applicable to full Lloyd's brokers (such as Walsham Brothers & Co Limited). It is premised on a broker-client relationship and would require the maintenance of IBAs. Here, outside the context of its direct contracts with syndicates and pursuant to the Biddencare Agreement, Senator was engaging in its activities as agent of and in the name of Dewey Warren, such that Senator was acting as agent of a broker, not a client. There was no broker-client relationship.

110. The use of the SEN 450 code, on the expert evidence, was in my judgment ultimately neutral. It did not signify whether the entity was a Lloyd's broker, a paragraph 11(8)(ii) entity or neither. It enabled Senator to process collections and Lloyd's to monitor that monies passing through the code were on behalf of Derek Bryant (the broker with whom that number was associated) (see paragraph [32] above), although in fact it seems to have been used for monies collected on behalf of other brokers as well, such as Dewey Warren. I find that the use of a broker code does not necessarily mean that the user was a Lloyd's broker or one who undertook all broking activities save for the placing of new business. Codes are access codes issued by the LPSO for the purpose of processing business with Lloyd's; access to Lloyd's systems was necessary for claims collection activities. In the Joint Memorandum, the experts agreed that Senator "*does not appear to have been registered or listed either as a Lloyd's broker, or agency broker, or 'existing Lloyd's broker' or under the Umbrella Arrangements Byelaw"* and "*that the function and use of a broker code was to process business at Lloyd's and with the London company market*".

Equitas's expert, Mr Burling, acknowledged that broker codes were given to non-brokers and that what had been required to obtain one was unclear. Accordingly, the fact that somebody had a broker code did not mean that they were a necessarily a broker. As Mr Burling said, the LPSO was "*ever practical*". Further, the fact that Mr Webb had a pass to the Room at Lloyd's does not indicate that he was a broker. His CV did not state that he was a broker.

111. I agree with the Defendants' submissions that there is no evidence of contemporary market understanding of what Senator were doing at the relevant time. As already identified, no evidence has been called from either the relevant Syndicates or their reinsurers as to their dealings with Senator or understandings of Senator's role.

112. Equitas understood from their 1996 attendance note (at paragraph [43] above) that Senator were providing "*collection services in respect of reinsurance recoveries*" and "*handling certain broker run off*". However, this does not in itself amount to Senator holding itself out as a Lloyd's broker whether in a full sense or more limited sense (i.e. acting as a Lloyd's broker save as to the placing of new business) or point to Equitas's understanding the same to be the case.

113. I therefore conclude that Senator's role in relation to the collections of monies which are the subject of this claim was determined by the terms of the Biddencare Agreement. It was not a Lloyd's broker but rather was an "*other person*" within paragraph 11(8)(ii) of the Byelaw performing some of the insurance broking functions of Dewey Warren, which was a Lloyd's broker. It was not on the IBRC list and did not appear on the Lloyd's list during the relevant period. It was not subject to the Code of Practice for Lloyd's brokers. It was not required to and had not entered into a Trust Deed and it was not required, as a Lloyd's broker would have been, to maintain an IBA. The manner in which it came to use the broker code '450 SEN' remains opaque but Senator's use of such code to process business through Lloyd's does not mean it was a Lloyd's broker. Accordingly, I cannot accept Equitas's submission that Senator is indistinguishable from Walsham Brothers & Co Limited. The latter were a full Lloyd's broker, with all the obligations that such a role entailed as determined in *Walsham*.

(1) Legal bases of the claims by Equitas against Senator

Contract

114. Equitas accepts that there was no express retainer between Senator and the Pateman or Cotesworth Syndicates and/or Equitas. However, Equitas alleges that there was an implied retainer. It is contended that this is supported by Mr Nugent's description of the very close relationship between Senator and the syndicates and the fact that Senator did administer outward contracts of reinsurance or retrocession protecting the syndicates, pursuant to which Senator dealt with payments under the Outwards Protections and Reinsurance Contracts.

115. Equitas (at paragraph 23 of its Amended Particulars of Claim) alleges that the terms of the implied retainer were as follows:

> *"(1) To make all appropriate efforts to identify any and all amounts received by it and/or held by it on behalf of the relevant Syndicates and/or the Claimants in connection with the Outward Protections and/or the Reinsurance Contract;*
> *(2) To inform the relevant Syndicates and/or the Claimants promptly and/or at regular intervals of any and all amounts received and/or held by it on behalf of such Syndicates and/or the Claimants in connection with the Outward Protections and/or the Reinsurance Contract;*
> *(3) To pay to such Syndicates and/or to the Claimants promptly any and all amounts received and/or held by it on behalf of such Syndicates and/or the Claimants in connection with the Outward Protections and/or the Reinsurance Contract;*
> *(4) To use the reasonable skill and care of a professional and experienced Lloyd's broker and/or reinsurance broker and/or reinsurance agent when performing the various duties set out above; and/or*
> *(5) To hold themselves ready to account and/or to account to such Syndicates and/or to the Claimants in respect of all amounts received and/or held by it on behalf of such Syndicates and/or the Claimants in connection with the Outward Protections and/or the Reinsurance Contract.*"

116. Equitas accepts that the general rule is that there is no privity between a sub-agent and principal (Senator being the sub-agent of each Run-Off Broker, including Dewey Warren), but submits that the *De Bussche* exception identified by Rix J in *Prentis v Leeds & Leeds* [1998] 1 Lloyd's Rep 326 applies and establishes a basis for such privity. I address the detail of the legal arguments advanced by Equitas below.

117. It is contended by Equitas that three points support its submission that there was an implied retainer:

    (1) The role of a run-off broker (or whatever role the court finds Senator was performing) necessarily involved the situation where the primary agent (i.e. the insolvent broker) can play no role in the continued execution of the syndicates' business and, in any event, is insolvent. As such, the syndicates have no recourse against the primary agent.

    (2) The concept of a run-off agent was understood in the Lloyd's market (as per the evidence of the Defendants' expert, Mr Bowmer) and all relevant participants (principally brokers, syndicates, insurance companies and Lloyd's itself) knew that if a broker became insolvent, that a run-off broker (or at least an agent of some form) would need to be appointed to administer the business of the insolvent broker and collect in reinsurance monies etc.

    (3) Mr Nugent accepted in his evidence that:

        (a) The syndicates were the "*clients*" of Senator;

        (b) The monies collected by Senator were not paid to any third party but Senator paid the "client" syndicates directly;

        (c) The syndicates were entirely reliant on Senator if they chose to use Senator by means of a direct contract. (While Mr Nugent stated that he

did not know about the relationship between Peter Webb and the various syndicates outside of the direct contract context, Equitas submits that *all* the syndicates serviced by Senator were entirely reliant on their services.)

(d) It is practice and custom in the Lloyd's market to appoint run-off brokers where a broker becomes insolvent. The syndicates knew this and consented to such an appointment as it was necessary to protect their interests and required that they be in a direct contractual relationship where they would have no realistic recourse against an insolvent broker.

118. The Defendants' submitted Senator (and Dermavale) were not retained impliedly by either the Pateman or Cotesworth Syndicates, and owed no obligations in contract. The Defendants note that Equitas' case prior to issue was that the Defendants had or had had "*interests*" in various third-party brokers but that this was not pursued in the claim issued. Instead, Equitas' case in the pleaded claim is that Senator took over responsibility for dealing with the legacy broking accounts of a number of brokers and thereby came to be expressly or impliedly retained by some syndicates with roles to "*administer outward contracts of reinsurance or retrocession*" and to be "*responsible for administering the operations or run-off of certain insurance/reinsurance brokers*". The case based on express retainer was abandoned at trial. The Defendants noted that Equitas appears to seek to characterise Senator as a Lloyd's broker in the same position as Walsham Brothers & Co Limited in the *Walsham* case so as to go on to allege that findings made in that case against Walsham should also be made against Senator in the present case.

119. The Defendants' case on retainers is as follows:

(1) First, that Senator was retained by Dermavale. That the evidence showed that between about 1992 and about 2004, Senator (as sub-contractor to Dermavale) provided debt collection services to a number of insurance and reinsurance brokers on a 'kill or cure' basis with agreed fees typically of 5% of balances settled by Lloyd's and ILU companies and 10% of balances settled by any other company. More particularly:

(a) by 1992 a non-party, Biddencare Ltd had (by a number of earlier agreements) acquired the business of various third-party insurance brokers and accepted responsibility for their run-off: see Recital A of the Biddencare Agreement; it could be said that Biddencare had stepped into the shoes of the third party brokers, including Dewey Warren;

(b) by the Biddencare Agreement, Dermavale bought from Biddencare (and with the consent of the third-party brokers) the right, title and interest in the amounts due from the insurance debtors of these brokers, including the right to collect insurance debts (per Recital B to the Biddencare Agreement);

(c) there was no wholesale transfer from Biddencare to Dermavale of Biddencare's obligations; Biddencare did not purport to transfer and Dermavale did not accept the acquired businesses or responsibility for run-off. The scope of Recital A to the Biddencare Agreement is significantly and materially different from as the scope of Recital B.

Indeed Recital B refers only to Dermavale accepting certain responsibilities for the collections and settlements (i.e. payments);

(d) a replacement broker would have been obliged to work for the syndicates. Dermavale was not obliged; by clause 3(ii) of the Biddencare Agreement, Dermavale could choose whether to make arrangements to collect;

(e) a replacement broker could have negotiated with reinsurers; no right to negotiate was transferred under the Biddencare Agreement;

(f) Dermavale had agreed to act at its own cost – see clause 3 of the Biddencare Agreement;

(g) Dermavale agreed with Biddencare to outsource to Senator its back-office administration including collections: clause 3(iii) of the Biddencare Agreement;

(h) Senator collected sums in the names of the run-off brokers (not in the name of the syndicates), as is now accepted by the Claimants;

(i) Dewey Warren was one of the third-party brokers who signed the Biddencare Agreement.

(2) Secondly, that Dewey Warren were brokers to the Pateman Syndicate and such that the Biddencare Agreement governed Senator's relationship with the Pateman Syndicate. That is supported by the documents. For example, monies collected in relation to the Pateman contract which have been shown to have been paid over were paid over without deductions. Dewey Warren (broker number 720) were also brokers to the Cotesworth Syndicate, although few documents relating to and identifying the Cotesworth Syndicate and its broker have been disclosed by Equitas.

(3) Thirdly, Senator accepts that it entered into direct contracts with some syndicates for the provision of debt collection services. But the claims in this action are not based upon those contracts. In addition, there is no evidence that Senator entered into direct contracts with the Pateman or Cotesworth Syndicates. Indeed, such evidence as there is points to Senator having not secured appointment from the Pateman or Cotesworth Syndicates.

(4) Fourthly, unlike in *Walsham* at [22], Senator did not later become a party to the Settlement Agreement reached in that case. Further, unlike Walsham Brothers & Co Limited, it did not receive or sign a letter from DAC (cf. *Walsham* at [26]) or receive or sign a Broker Transfer Agreement (cf. *Walsham* at [28]).

(5) Fifthly, while Mr Luben stated that claims monies were normally collected by brokers, he did acknowledge in his evidence that other entities would make collections. Senator was one of those entities. Although Mr Luben maintained that this happened in the mid-2000s, the documents show Senator to have been operating from 1992. There are numerous documents showing that from 1995, they were trying to get claims collection retainers from Equitas. Senator was not engaged by Equitas. There are numerous documents evidencing repeated attempts by Senator to be sub-contracted by Equitas to provide a "*collection service*" but Senator's initial efforts in December 1995 were demonstrably rebuffed and further efforts in December 2006, April 1997, May 1997, May 1999 and September 2001 also came to nothing. Further, by letter dated 20 October 1998, Equitas wrote to Senator about Senator "*offering your collection services on an excess of loss reinsurance*" adding "*we will not be making any agreements which include collecting commission on recoveries from Lloyd's*

> *syndicates*". Since reinsurers on the Pateman reinsurance contract include Lloyd's syndicates the prohibition on Equitas making an agreement extended to an agreement to collect in relation to the Pateman reinsurance contract. It was submitted that Senator was not in a contractual relationship with any relevant Syndicate such that no contractual obligations could have existed. Senator was a subcontractor of Dermavale. Next, Dermavale was in a contractual relationship with Biddencare. Next, there appear to have been contractual links in a chain between Biddencare and various third-party brokers as well as between the third-party brokers and the syndicates. Generally there is no privity between a principal and any sub-contractor (or even sub-agent or sub-sub agent, etc.): see *Prentis v. Leeds & Leeds* [1998] 1 Lloyd's Rep 326, p 329 col 1. There is no good basis for an exception in this case. While Syndicate Underwriting Management ("SUM") who had a role in relation to Equitas, may from time to time have provided Dermavale with some information in relation to the Pateman Syndicate following queries raised by reinsurers (e.g. in a letter to Senator dated 3 October 1997), there is no evidence that the Pateman Syndicate intended that there should be privity between it and Senator, or that there should be no contract between Dermavale and Senator or no contract between Dermavale and Biddencare and the third-party brokers, etc. (a contract which could have been terminated). Equitas's reliance on Senator charging fees and demand for payment from Equitas were (i) in relation to the CH Bohling Syndicate where Senator had been appointed by that syndicate under a direct retainer and (ii) not in respect of collections for third party run-off brokers.

120. I turn now to my determination of whether Senator was subject to an implied retainer by the relevant Syndicates/Equitas. The law as to implied retainers was recently conveniently summarised and restated by Snowden J in *NDH Properties Limited v. Lupton Fawcett LLP* [2020] EWHC 3056 (Ch); [2021] PNLR 8 ("**NDH**") at [80]-[82].

> *80. The leading statement of when a retainer will be inferred in this way is to be found in the decision of the Court of Appeal in Dean v Allin & Watts [2001] PNLR 39 ("Dean v Allin & Watts"). In that case, Lightman J, with whom Robert Walker and Sedley LJJ agreed, stated at [22]:*
>
> > *"… As a matter of law, it is necessary to establish that A&W by implication agreed to act for Mr Dean: an implied retainer could only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties. In Searles v Cann and Hallett [1993] PNLR 494 the question arose whether the solicitors for the borrowers impliedly agreed to act as solicitors for the lenders. Mr Philip Mott QC (sitting as a deputy judge of the Queen's Bench Division) held that there was nothing in the evidence which clearly pointed to that conclusion. He went on:*
> >
> > > *'No such retainer should be implied for convenience, but only where an objective consideration of all the circumstances make it so clear an implication that [the solicitor himself] ought to have appreciated it.'*
> >
> > *'All the circumstances' include the fact, if such be the case (as it is here), that the party in question is not liable for the solicitors fees and did not directly*

> *instruct the solicitors. These are circumstances to be taken into account, but are not conclusive. Other circumstances to be taken into account include whether such a contractual relationship has existed in the past, for where it has, the court may be readier to assume that the parties intended to resume that relationship, and where there has been such a previous relationship the failure of the solicitor to advise the former client to obtain independent legal advice may be indicative that such advice is not necessary because the solicitor is so acting: see e.g. Madley v. Cousins Combe & Mustoe [1997] EGC 63 …."*

81. In Caliendo v Mishcon de Reya [2016] EWHC 150 (Ch) , Arnold J cited that statement of principle and referred also to the decision of Hamblen J in Brown v Innovator One plc [2012] EWHC 1321 (Comm) on the requirements for an implied contract. In that case, Hamblen J emphasised that it is for the party alleging the existence of an implied contract to show the necessity for implying it and observed, at [1016],

> *"1016. Necessity in this context generally requires demonstrating that the parties have acted in a way which is consistent only with an intention to make a contract. If they would or might have acted the same way in the absence of such a contract then necessity is unlikely to be established. In The Gudermes [1993] 1 Ll.R. 311 at 320 the Court of Appeal approved the following direction given by the Judge (Hirst J):*
>
> > *'In my judgment no implied contract can be inferred unless it is necessary to give business reality to the transaction, and unless conduct can be identified referable to the contract contended for which is inconsistent with there being no such contract; and it is fatal to the implication of such a contract if the parties would or might have acted exactly as they did in the absence of such a contract..'"*

82. In Caliendo at [682], Arnold J summarised the test by asking,

> *"Was there conduct by the parties which was consistent only with [the defendant firm] being retained as solicitors for the Claimants?"*

121. Accordingly, to establish an implied retainer, Equitas must show that Senator acted in a way which was consistent *only* with Senator being retained by each of the relevant Syndicates or itself.

122. In *Prentis Donegan & Partners Ltd v. Leeds & Leeds Co Inc* [1998] 1 Lloyd's Rep 326 ("**Prentis**"), Rix J (as he then was) addressed the issue of privity between a principal and sub-agent in the context of marine insurance. The claimant in that case was a Lloyd's placing broker and the defendant a New York producing broker. The dispute related to payment of premiums. The claimant sued the defendant alleging that as sub-agent it was not in contractual relations with the principal but with the defendant as agent, and was entitled to be paid premiums from the defendant on the basis of an implied term. The defendant accepted that generally there was no privity between sub-agent and principal

but relied on *Velos Group Ltd v Harbour Insurance Services Ltd* [1997] 2 Lloyd's Rep 461 as showing that by reason of the necessity of using a Lloyd's broker in the Lloyd's market the principal could be regarded as in privity with the sub-agent. Accordingly, it contended that the claimant must sue the principal (an English company "Offshore" which managed 3 ship-owning companies insured for hull and machinery risks). Rix J gave summary judgment for the claimant holding that there was no arguable defence that there was privity between the plaintiff and Offshore so as to exclude privity between the claimant and defendant. Where a producing broker employed a placing broker at Lloyd's the normal situation was that there was privity of contract between them. The defendant would have to show that the claimant's involvement was intended by each of Offshore, the defendant and the plaintiff to create contractual relations directly (and only between) Offshore and the claimant. The evidence in that case did not support such a submission. There was no direct contract between Offshore and the claimant, and the terms on which the claimant dealt with the defendant were not the same as the terms on which the defendant dealt with Offshore.

123. At p.329 col.1 of *Prentis*, Rix J referred to the defendants' acceptance that "*the general rule is that there is no privity of contract between principal and sub-agent, only between agent and sub-agent*". The defendants in that case relied on an exception to that rule where the principal knows and acknowledges that the agent has to delegate the whole of his responsibilities to a sub-agent. I will set out the relevant passages in full:

> "*On behalf of the defendants, Mr. Gaisman, Q.C. accepts that the general rule is that there is no privity of contract between principal and sub-agent, only between agent and sub-agent, but relies on an exception to that rule where the principal knows and acknowledges that the agent has to delegate the whole of his responsibilities to a sub-agent. He is therefore prepared to accept the statement of the relevant principles found in art. 37(2) and (3) of Bowstead & Reynolds on Agency, 16th ed., (1996), at para. 5-008, as follows:*
>
> > *'(2) The relation of principal and agent may be established by an agent between his principal and a sub-agent if the agent is expressly or impliedly authorised to constitute such relation, or if his act is ratified, and it is the intention of the agent and of such sub-agent that such relation should be constituted.*
> >
> > *(3) But there is no privity of contract between a principal and a sub-agent as such merely because the delegation was effected with the authority of the principal; and in the absence of such privity the rights and duties arising out of any contracts between the principal and the agent, and between the agent and the sub-agent, respectively, are only enforceable by and against the immediate parties to those contracts. However, the sub-agent may be liable to the principal as a fiduciary, in tort, and possibly in other respects.'*
>
> *In effect, therefore, it has to be the intention of all three parties, principal, agent and sub-agent, to effect a direct contractual relationship between principal and sub-agent.*
>
> *The leading case on the exceptional situation spoken to in art. 37(2) is De Bussche v. Alt (1878) 8 Ch.D. 286. That was a claim by a principal against a sub-agent in*

Japan to whom his agent had delegated the sale of the principal's yacht. The sub-agent sold the yacht, but took an enormous secret profit. The principal sued the sub-agent to recover that secret profit, and succeeded. Lord Justice Thesiger, delivering the judgment of the Court of Appeal, said this (at pp. 310-311):

> *'But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "a sub-agent" or "substitute" (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of the opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself.'*

Mr. Gaisman points out, quite correctly, that De Bussche v. Alt has been recently applied to the very relationships presently under consideration, namely those of a principal, a producing broker and a placing broker in the context of the making of an insurance policy at Lloyd's: see Velos Group Ltd. v. Harbour Insurance Services Ltd. [1997] 2 Lloyd's Rep. 461, a decision of Judge Hallgarten, Q.C. at the Central London County Court (Business List). There, the producing broker, Velos, sued the placing broker, Harbour, to recover the return of premium which underwriters had credited to the latter. Harbour claimed to set off the balance of its commission. It was held that it was entitled to do so. In the course of his judgment Judge Hallgarten,Q.C. found that Harbour was in privity of contract with the assured and thus could rely on its contractual entitlement to commission as a defence (at p. 463): otherwise it would have had to account for the return of premium simply as a fiduciary "without room for any deduction based on purported contractual rights" (at p. 462). He said -

> *'It seems to me that where shipowners authorise or cause risks to be place[d] in the Lloyd's market, they must be taken to know that the producing broker may not be able to go into the market himself. In those circumstances, since of necessity a sub-agent has to be appointed (see De Bussche v. Alt (1878) 8 Ch. D. 286, per Lord Justice Thesiger giving judgment in the Court of Appeal at p.311), the right inference to draw is that a direct relationship is established between the actual or prospective assured and the subagent...*

> *In those circumstances, as I see it, the owners may be regarded as being in privity of contract with Harbour ...'*

On behalf of the plaintiffs, however, Mr. Rowland Q.C. submits that the De Bussche v. Alt exception, although stated in broad language, has been held in subsequent authorities to be a narrow exception, to be supported only on its special facts and because the claim, although put and upheld in contract, could more properly be laid even in the absence of privity on the ground that the sub-agent was a fiduciary, as would at any rate nowadays be recognised. He submitted that Judge Hallgarten Q.C. was therefore mistaken in Velos v. Harbour Insurance to apply that limited exception to the situation of principal assured and sub-agent placing broker in the Lloyd's market.

In my judgment, I have to bear in mind that the question before me is not merely whether Offshore and the plaintiffs are in privity of contract, but whether the plaintiffs and the defendants are not, because the latter are agents only. Mr. Gaisman submits that if the defendants are agents, then prima facie they are agents only, and as such not liable for premium. In my view, however, the relationships are more complex than that, for the defendants are of course agents, otherwise there could be no question of the contract effected by the brokers flowing through the various layers of agency involved so as to bind assureds and underwriters to one another. Similarly, in every case of agency and sub-agency, the ultimate principal and the ultimate third party will be brought into direct contractual relations. That, however, does not prevent the general rule that a principal and a sub-agent are not in privity of contract with one another: and that shows that the fact that the agent who appoints a sub-agent is an agent is not determinative of his ability to disclaim any liability to the sub-agent he appoints…..

Powell & Thomas v. Evan Jones & Co., (1905) 1 K.B. 11 was a case, like De Bussche v. Alt, where the principal, Evan Jones, was suing (by counterclaim) the sub-agent, Cowperthwaite, for a secret profit. The claim was put not only in contract but also on a fiduciary basis. On the facts, there was direct communication between principal and subagent, and indeed once the agent had introduced the sub-agent to the principal, the agent seems to have dropped out of the picture (at p. 13). At first instance the Judge had found in favour of the principal on both bases. On appeal Collins MR agreed with the Judge as to the fiduciary claim, and as to the contractual claim said more cautiously that whether he would himself have drawn the inference of privity, he was unwilling to differ on a matter of fact from the view of the Judge (at p. 18). Lord Justice Stirling agreed that the principle laid down in De Bussche v. Alt was applicable, but said it was "not really necessary to go as far as this", because the sub-agent was a fiduciary in any event (at pp.20-21). Only Lord Justice Matthew, while similarly supporting both bases for the decision, appears to have been more enthusiastic about the contractual basis, indeed putting it in broad terms, saying (at p.22):

> *'It frequently happens in matters of business of this kind that an agent, who is employed to render services for a principal, finds that he is not in a position to render those services himself, and, with the knowledge of his principal, he applies to another person, who may have greater facilities for carrying the*

> *transaction through. I think that the ordinary course of business in such a case as this is that the last-mentioned person takes the position of agent to the principal. It would be difficult in such cases to suppose that the principal would assent to the conduct of the business in which he was interested being transferred to a person who did not in carrying it out undertake the obligations of an agent towards him. As a matter of sound business it would generally be necessary that such should be the relation.'*

Then in Calico Printers Association v. Barclays Bank Ltd., (1930) 36 Com. Cas. 71 the earlier authorities were thoroughly reviewed by Mr. Justice Wright, whose judgment has become the classical exposition of the law on this subject: see at pp. 77-82. He explained (at pp. 81-82) that in De Bussche v. Alt a bill in equity had been filed for an account and that –

> *'. . . apart from the specific finding of fact that there was authority to create direct privity, the case turned on equitable principles: the sub-agent was pro tanto in a fiduciary position as regards the secret profits and could not retain them as against the person whom he knew to be entitled - namely, the actual principal.'*

As to Powell & Thomas v. Evan Jones & Co. he pointed out the special nature of the facts. As to the matter of principle, he said this (at pp. 77-78).

> *'But I do not think the English law has admitted any such general principle; it has in general applied the rule that even where the sub-agent is properly employed, there is still no privity between him and the principal: the latter is entitled to hold the agent liable for breach of the mandate, which he has accepted, and cannot in general claim against the sub-agent for negligence or breach of duty. I know of no English case in which a principal has recovered against a sub-agent for negligence. The agent does not as a rule escape liability to the principal merely because employment of the sub-agent is contemplated. To create privity it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof. In general where a principal employs an agent to carry out a particular employment, the agent undertakes responsibility for the whole transaction and is responsible for any negligence in carrying it out, even if the negligence be that of the sub-agent properly or necessarily engaged to perform some part; because there is no privity between the principal and the sub-agent.'*

It may be that in more recent times it has, in at any rate a limited number of cases, become possible to sue the sub-agent in tort for negligence (see Henderson v. Merrett Syndicates Ltd. [1994] 2 Lloyd's Rep. 468; [1995] 2 A.C. 145). That possibility, however, makes it easier, rather than more difficult, to maintain the classical position of absence of direct privily in contract, even if, as Mr. Gaisman was perhaps right to submit, the cause of action in tort may not be open in many situations (ibid. at p. 499, col. l; p. 195 G-H).

Since Calico Printers, the influence of De Bussche v. Alt would seem to have waned. Indeed, Mr. Gaisman has cited no case in which it has been applied since that time, with the exception of course of the recent and very pertinent case of Velos v. Harbour Insurance. Moreover, in Henderson v. Merrett Syndicates Ltd. at p. 503, col. 2; p. 202F Lord Goff of Chieveley said that (what is now) art . 37(3) of Bowstead & Reynolds stated the law, and added (at p. 503, col. 2; pp. 202H-203A):

> *'Of the three authorities cited by Mr. Eder in support of his submission on this point De Bussche v. Alt, (1878) 8 Ch. D. 286, Powell & Thomas v. Evan Jones & Co., [1905] 1 K.B. 11 and Tarn v. Scanlan, [1928] A.C. 34, the first two were concerned with the accountability of a subagent for secret profits, and the third with liability for income tax. Each was a decision on its own specific facts, and none provides Mr. Eder with assistance in the form of general guidance on the circumstances in which a contractual relationship may come into existence between a principal and a sub-agent.'*

As for Velos v. Harbour Insurance itself, it seems to me that the utility of that case for Mr. Gaisman's purposes is much reduced by the following considerations. In the first place and most importantly, Judge Hallgarten, Q.C. expressed his concern that the matter was covered by authority (by which he must have meant authority not cited to him): the authorities referred to above would seem to me to bear out his concern. Secondly, the ultimate issue which is before me, namely whether the placing broker is in contractual relations with the producing broker, does not seem to have been relevant in that case, for Velos was the producing broker and was held to be bound by contractual defences. Thirdly, I am not sure that it would have made any difference to the outcome of that case whether or not the owners were in contractual relations with Harbour. Fourthly, there were perhaps special facts in that case (see the first full paragraph at p. 463).

In these circumstances, it seems to me that Velos v. Harbour Insurance is not of great assistance to Mr. Gaisman, even in, as of course I bear in mind, the O.14 context in which this claim is being made.

In any event, I cannot agree that where a producing broker employs a placing broker at Lloyd's, the normal situation is that there is no privity of contract between the brokers, even if, which I doubt, Velos v. Harbour Insurance is to be taken as authority for that proposition. In my judgment the authorities show that the De Bussche v. Alt exception is indeed an exception, and a narrow one, and the burden must be on the defendants to show some special factors in this case to raise an argument that the general rule makes way for the exception. Such factors might be found, for instance, in the direct relations that might exist between Offshore and the plaintiffs, or in the consideration that, as Mr. Gaisman put it, the delegation by the defendants to the plaintiffs was complete, effecting a complete substitution of the defendants by the plaintiffs (to pick up the term "substitute" used in De Bussche v.Alt) and indicating that the defendants' sole responsibility to Offshore was to procure a competent placing broker, but not to place or procure the insurance itself. Ultimately, one would be looking for signs that the involvement of the plaintiffs was not merely authorized by Offshore, but intended by each of Offshore, the defendants and the plaintiffs, to create contractual relations directly (and only) between Offshore and the plaintiffs."

124. Equitas relies in particular on Rix J's citation of Matthew LJ in *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11 to the effect that:

> *"It frequently happens in matters of business of this kind that an agent, who is employed to render services for a principal, finds that he is not in a position to render those services himself, and, with the knowledge of his principal, he applies to another person, who may have greater facilities for carrying the transaction through. I think that the ordinary course of business in such a case as this is that the last-mentioned person takes the position of agent to the principal.* ***It would be difficult in such cases to suppose that the principal would assent to the conduct of the business in which he was interested being transferred to a person who did not in carrying it out undertake the obligations of an agent towards him.*** *As a matter of sound business it would generally be necessary that such should be the relation."* (emphasis added)

Equitas further relies on the judgment of Wright J *in Calico Printers Association v Barclays Bank Ltd* (1930) 36 Com Cas 71 as follows:

> *"To create privity it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof."*

Whilst Equitas accepts that a finding of privity of contract is exceptional, it submits that the present case is such an exceptional case.

125. For there to be privity of contract between the Syndicates/Equitas and Senator, Equitas would have to establish that Senator's involvement was intended by each of the Syndicates/Equitas, Biddencare/Dewey Warren and Senator to create contractual relations directly, and only, between the Syndicates/Equitas and Senator. However, as in *Prentis*, the evidence in this case simply does not support such an intention.

126. Here, there is no evidence of any direct dealings or other conduct between Senator and the relevant Syndicates except for the provision of some limited information by Lioncover Collections and/or Syndicate Underwriting Management Limited ("**SUM**") on behalf of the Pateman Syndicate to Senator during 1997 and 1998 essentially issuing collection notes to be submitted to reinsurers, from which retainers between Senator and the Pateman and Cotesworth Syndicates could be implied. The correspondence with Lioncover Collections/SUM does not itself provide a basis for retainers to be implied since it simply identifies losses for collection or provides collection notes and revised collection notes requested by reinsurers without any indication of the basis on which such information or collection notes were being supplied to Senator or its legal relationship with Senator.

127. As I have already found, the evidence indicates that the Pateman Syndicate and Cotesworth Syndicate collections were handled by Senator under the Biddencare Agreement. There is no evidence of any direct contract between Senator and the Pateman and Cotesworth Syndicates or any appointment of Senator by those Syndicates to collect monies on their behalves. Indeed, Appendix II of the document provided to Equitas in

May 1999 (see paragraph [50] above) expressly provided that in relation to the Pateman syndicate Senator had "*identified recoveries but had not secured appointments*". In addition, where Senator did pay the Pateman Syndicate (e.g. on 9 March 1998), it did not deduct commission (whereas if it had had a direct retainer, its commission would have been either 5% or 10%). There is no evidence before me as to what the Syndicates authorised or consented to or even knew about the arrangement.

128. No contract was entered into between Equitas and Senator, despite Senator's repeated attempts at seeking such engagement and despite the lack of any clear regulation over claims collection companies who appear to have sprung up in the Lloyd's market during the 1990s/2000s following the insolvency of various Lloyd's brokers. If such a contract had been entered into, Equitas could itself have expressly provided the duties which it now contends for. Equitas was told in May 1999 (and possibly at the prior meeting in March 1999) that Senator had acquired the rights of brokers, including Dewey Warren, to collect the insurance debtor entries within their ledgers subject to an obligation to pay the related creditor as and when the debt was collected in May 1999 (see paragraph [50] above) but did not apparently seek further details of the agreement by which Senator had acquired such rights or its terms in order to ensure that the Syndicates/Equitas's interests were protected.

129. I have already determined that the use of a broker code does not necessarily mean that the user was a Lloyd's broker or one who undertook all broking activities: see paragraphs [104-113] above. Moreover, Equitas's own evidence shows that it knew and understood in January 1996 that the broker code SEN 450 was "*in respect of run-off collections only*" (see paragraph [31] above).

130. As to whether there was a 'holding out' to the syndicates, there is no evidence before me of Senator having held itself out to the Pateman or Cotesworth Syndicates as a Lloyd's run-off broker. As to whether there was any holding out to Equitas, the documents show that Equitas knew that Senator was collecting claims. I do not consider that the documents advanced when seeking engagement by Equitas or the marketing material from 2005/2007 amount to a holding out that Senator was a Lloyd's run-off broker.

131. Equitas invited me to find that an implied retainer was a "short step" taking into account (a) the Biddencare agency relationship and (b) the dependency of the syndicates on Senator. However, the suggested implied retainer would by-pass a contractual chain (1) from Senator to Dermavale (2) Dermavale to Biddencare/Dewey Warren and (3) from Dewey Warren to the relevant Syndicates. The contractual chain is in fact *inconsistent* with there being any implied retainer by the Pateman or Cotesworth Syndicates and Senator, which must be the *only* retainer for it to be implied.

132. As to dependency, the Syndicates were dependent upon Dewey Warren, which was the broker that placed the relevant contracts but which was insolvent or Biddencare (which according to Recital A to the Biddencare Agreement *did* step into Dewey Warren's shoes) but, according to the evidence, Biddencare too then became insolvent. Under the Biddencare Agreement, Dermavale did not assume the same responsibilities as either Dewey Warren or Biddencare. It had more limited obligations as set out at paragraph [24] above. Dermavale accepted "*certain responsibilities for the collection of the Insurance Debts and the subsequent settlement of the amounts due to the relative Insurance Creditor*". It undertook to "*review the Insurance Debts and so far as is*

reasonably practicable sort out all files, records and other documents concerning the Insurance Debts". By clause 3(ii), its obligation to identify and make arrangements to collect the Insurance Debts transferred to it and apply each amount so collected in settlement of the amount due to the related Insurance Creditor arose only where Dermavale considered it reasonably practicable and economically prudent having regard to the likely cost of doing so. This was not an absolute obligation to collect sums. Neither do I accept it could simply *choose* whether or not to do so – if it was reasonably practicable and economically prudent having regard to the cost of so doing, it was under a contractual duty to collect the sums. There was no commission earned on claims collected or any brokerage on reinstatement premiums. Dermavale then sub-contracted its obligations to Senator (although no agreement was set out in the Third Schedule as indicated at clause (iii) to the Biddencare Agreement).

133. The Claimants' contended basis for the implication of a retainer is that Senator "*administered the operations or run-off of third-party brokers*" in the relevant period. However, absent a direct contract with a syndicate, the Biddencare Agreement delineated the scope of Senator's obligations for administration or run-off in relation to Dewey Warren and those obligations were not co-extensive with those of Biddencare or Dewey Warren to the relevant Syndicates.

134. Whilst in practical terms, there was of course some dependency by the Pateman or Cotesworth Syndicates/Equitas on Senator to make collections and then to pay the sums collected over, there was no absolute obligation on the part of Senator to collect. In legal terms, the Pateman and Cotesworth Syndicates/Equitas were reliant on Dewey Warren (and possibly also Biddencare if and insofar as the agreements between Dewey Warren and Biddencare gave rise to enforceable legal rights on the part of the Syndicates) to collect the monies due to them, not Senator.

135. There is no evidence before me of the Syndicates having intended that there should be privity between them and Dermavale or Senator. The evidence in relation to Equitas indicates that Equitas intended precisely the opposite and that it had little or no intention of entering into contractual relations with Senator.

136. In my judgment, Equitas has not discharged the burden of showing that Senator acted in a way which was consistent *only* with an intention on the part of Senator to make a contract with the Pateman and Cotesworth Syndicates and *only* with such Syndicates. On the contrary, its contractual relationship was with Dermavale and/or Biddencare and/or Dewey Warren. In relation to any breach of Senator's contractual duties, it would be open to an action in that regard by Biddencare and/or Dewey Warren, but not by the Pateman and Cotesworth Syndicates and/or Equitas save insofar as they had obtained an assignment of the said contractual causes of action from Biddencare and/or Dewey Warren (which does not appear to have been sought). Accordingly, I conclude that there was no implied retainer between Senator and the Pateman and Cotesworth Syndicates or Equitas.

Tort

137. Equitas further or alternatively submits that Senator owed a common law duty of care in tort to the Syndicates/Equitas on the basis of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 ("***Hedley Byrne***"); and (2) *Henderson v. Merrett*

Syndicates Ltd [1970] 2 AC 145 ("***Henderson v Merrett***") and contends that this conclusion is supported by the decision in *Pangood Ltd v. Barclay Brown & Co. Ltd* [1999] PNLR 678 ("***Pangood***").

138. It is said by Equitas that in *Prentis,* Rix J observed that following *Henderson v. Merrett*, it was now possible for a principal to sue a sub-agent in tort for negligence and that in *Henderson v Merrett,* Lord Goff found that the managing agents of a Lloyd's syndicate owed a tortious duty of care to the underlying names as a consequence of there being, "*plainly an assumption of responsibility in the relevant sense by the managing agents towards the Names in their syndicates"* (at page 182 D-F).

139. Equitas relies on the following five alleged features in support of its contention that Senator owed a duty of care to the relevant Syndicates/Equitas at common law:

(1) While Senator was a sub-agent, at all times all parties knew that the principal agent (the insolvent brokers) would play no role in the performance of any obligations towards the Syndicates and that in any event it was insolvent and so unable to compensate the Syndicates in the event of any breach of its obligations by Senator;
(2) Senator was in a direct relationship with the Syndicates in that they collected monies and paid those monies directly to the Syndicates;
(3) The very close proximity is exemplified by the fact that Mr Nugent had no hesitation in describing the Syndicates as Senator's "*clients*";
(4) Mr Nugent accepted that the Syndicates were entirely reliant on Senator (albeit in the context of direct contracts of retainer);
(5) Mr Bowmer accepted that Senator had stepped into the shoes of the brokers.

140. Equitas emphasises that the importance of the very close relationship is exemplified by the decision in *Pangood* where the claimant had instructed the defendant insurance brokers to insure their premises against fire and the defendants had in turn instructed Lloyd's brokers to obtain a quotation and then proceed with the transaction. The defendants sought contribution (by way of a third party notice) against the Lloyd's brokers on the basis that the latter would have been liable to the claimant in respect of the same loss. The third party notice was struck out at first instance as disclosing no cause of action. The Court of Appeal upheld that decision on the basis that, although it was possible for a sub-agent to owe a duty of care in tort to an ultimate principal, in that case there had been no assumption of responsibility capable of giving rise to such a duty and on the evidence, the claimant had relied solely on the expertise of the defendants, not the third party Lloyd's brokers. At p.683 A-B, Beldam LJ stated:

> *"Thus it seems to me entirely reasonable that the third party should in this case deal with the defendant as knowledgeable brokers and make such communications as they are required to make through the defendant. In these circumstances, I would hold that no duty of care in the respects alleged is made out."*

141. Equitas contends that the distinction between that and the present case is obvious: in the present case the relevant Syndicates could not deal with the primary broker and as such they had no choice but to rely on Senator. It is said that the reality of the relationship was that the relevant Syndicates were entirely reliant upon Senator.

142. The Defendants submitted that Senator was not obligated to either Syndicate in tort because a tortious duty is not owed unless the sub-agent assumes responsibility directly to the principal and there exists the necessary reliance. Senator's case is that it owed no tortious duties to the relevant Syndicates because:

(1) No contracts existed between the Pateman or Cotesworth Syndicates and Senator creating the proximity for any common law *concurrent* tortious duty, unlike in the *Walsham* case;
(2) Senator did not receive or sign the DAC letter and thereby assume non-contractual duties to syndicates (or Equitas), unlike the *Walsham* case;
(3) Further, in relation to the Pateman Syndicate, if Senator had acted in relation to it, it did so pursuant to its arrangement with Dermavale. Senator collected as sub-contractor for Dermavale; further, there is no evidence from the Pateman Syndicate that it was relying on Senator for payment as opposed to relying on others, in particular Dewey Warren or Biddencare.
(4) It is said that Equitas's pleading lacks particulars as to why any stand-alone duty of care should have existed and that, contrary to Equitas's opening submissions, Senator was not collecting as agent for the Syndicates but as a sub-contractor for Dermavale. Further, Dermavale was not collecting as agent for the syndicates but was collecting for and in the name of the third-party brokers pursuant to clause 4(iii) of the Biddencare Agreement. Dermavale and Senator did not assume responsibilities to Equitas. Further, there is no evidence of Equitas having relied upon either Dermavale or Senator.
(5) Finally, it was submitted that it is important in commercial dealings to maintain the contractual chains and require parties to follow the contractual chain and not to introduce unwarranted tortious obligations.

143. I now turn to determine whether or not a common law tortious duty was owed by Senator to the relevant Syndicates or Equitas. Whilst tortious duties can be owed by sub-agents to a principal (*Henderson v. Merrett*), the Defendants are correct that a tortious duty is not owed unless the sub-agent assumes responsibility for what he did directly to the principal or is to be treated in law as having done so, and there is necessary reliance by the principal on the sub-agent: see *NDH* at [99]-[111]. As set out at paragraph [101] of *NDH*, citing *Customs & Excise v Barclays Bank plc* [2007] 1 AC 181 at [4], the paradigm situation is a relationship having all the indicia of contract save consideration. *Hedley Byrne* would, but for the express disclaimer, have been such a case. *White v Jones* [1995] 2 AC 207 (in which two disappointed beneficiaries under a will sued the solicitor who had failed to act upon instructions from a testator to draw up a new will leaving legacies to them and to revoke an earlier will which had disinherited them following a family quarrel) and *Henderson v Merrett*, although the relationship was more remote, can be seen as analogous. At *NDH* [103], Lord Mance's judgment from *Customs & Excise v Barclays Bank plc* at [91] was cited, where he recognised that the case of *White v Jones* represented an exception in that the solicitor drafting a will whose assumption of responsibility towards his *client*, the testator, was held as a matter of law also to extend to the intended beneficiary who (as the solicitor could reasonably foresee) might suffer loss as a result of being deprived of his intended legacy in circumstances in which neither the testator nor his estate would have a remedy against the solicitor. It was because there would otherwise be a lacuna in the law leading to injustice that the House of Lords concluded a remedy under the *Hedley Byrne* principle should extend to an intended

beneficiary. Equitas, citing p.295H-260A of *White v Jones*, submits the same situation exists here, in that it has no realistic recourse against Dewey Warren and/or Biddencare who are insolvent and, absent a duty of care in tort, this would effectively be a legal wrong without a remedy.

144. I have already determined that there was no contractual relationship between Senator and the Pateman or Cotesworth Syndicates and/or Equitas. Accordingly, any tortious duty of care would have to be freestanding.

145. However, again, there is no evidence of any dealings with the relevant Syndicates (save as set out in paragraph [126] above) which would support a finding that Senator assumed responsibility directly to those Syndicates. There is no evidence that the Syndicates expressly authorised or even knew what arrangements had been made by Dewey Warren, once in receivership, for the collection of monies owed to them. I accept that there may have been *some* reliance placed on Senator by the Pateman Syndicate to be inferred from it supplying information to Senator regarding collections, but again there is no evidence as to the nature and extent of that reliance on Senator. There is no evidence of any reliance by the Cotesworth Syndicate at all. Further, it is not clear that the Syndicates were *not* relying on Dewey Warren or Biddencare. There is little evidence as to their knowledge of the status of those companies during the relevant period 1998-2004. Lioncover Collections/SUM originally wrote in March 1997 to Durham Hadley Cannon Ltd which was in receivership in this regard, indicating that it was not aware of the arrangements which had been made. The joint receivers redirected SUM to Senator. It is not possible to conclude that Senator stepped into the shoes of Dewey Warren given that its duties were limited to the contractual obligations it undertook as set out at paragraph [132] above and were not co-extensive with those of Biddencare or Dewey Warren. In particular, Senator was collecting for and in the name of the brokers, such as Dewey Warren, pursuant to clause 4(iii) of the Biddencare Agreement, not the Syndicates or Equitas.

146. Mr. Nugent's reference to syndicates as Senator's "*clients*" was in the context of Senator having a mix of direct contracts with syndicates and syndicates for which it was collecting pursuant to the Biddencare Agreement. Senator did assume responsibility to Biddencare and/or Dewey Warren pursuant to and in accordance with the terms of the Biddencare Agreement, which would be consistent with it owing a tortious duty of care to Biddencare and/or Dewey Warren as well as its contractual duties. However, Equitas has not demonstrated an assumption of responsibility by Senator directly to the Pateman and Cotesworth Syndicates (or Equitas) or the necessary reliance by the relevant Syndicates/Equitas on Senator. There is little evidence supporting any close relationship between Senator and those Syndicates and as to what reliance was in fact being placed on Senator to collect monies owed to the Syndicates.

147. Further I am not persuaded that this is a case where there exists a legal wrong but no remedy such as *White v Jones* which might justify a court striving to find that a duty of care was owed regardless of whether or not there was in fact an assumption of responsibility directly to the Syndicates or Equitas. It is clear that Biddencare and/or Dewey Warren are owed at least contractual (and probably also other) duties by Dermavale and Senator to apply all amounts collected from reinsurers in settlement of the amount due to the related Insurance Creditor (i.e. here, the Pateman and Cotesworth Syndicates). If the insolvency practitioners responsible for those entities had been aware

(or made aware) of the potential claim against Senator and had been unable or unwilling to pursue Senator for recovery of the monies, it would seem likely that Equitas would have been able to secure an assignment of those companies' rights against Senator, albeit (subject to any trust over any recoveries in favour of Equitas) potentially on terms which would have involved sharing at least some of the recoveries with other creditors. Whilst Equitas asserts that it had no realistic recourse against Biddencare or Dewey Warren because they are insolvent, I am not satisfied that this was necessarily the case, especially when the avenue of seeking an assignment of their rights of action against Senator was not (at least on the basis of the evidence and argument before me) even explored. My perception, based on the history and how the claim was put both on the pleadings and in written opening, is that this claim was launched and pursued by Equitas on the assumption that it was largely identical to the *Walsham* case. However, the facts and circumstances of this case are quite different, in particular in relation to the contractual framework under which Senator was operating as set out in the Biddencare Agreement. This has necessitated Equitas altering its legal case at trial (e.g. by abandoning the claim that there was an express retainer and advancing that there existed a type of 'Quistclose' trust) as the differences between this case and *Walsham* became increasingly apparent. However, an alternative route to seeking to assert direct duties owed to the Syndicates/Equitas would have been to pursue a remedy via the contractual chain.

148. I conclude that Equitas has not established that a common law duty of care was owed by Senator to the Pateman and/or Cotesworth Syndicates (or, therefore, to Equitas as their assignee).

Fiduciary duty

149. Equitas further or alternatively contends that Senator owed fiduciary duties to the Syndicates/Equitas. It submits that while there is no definitive definition of what sort of relationship results in the imposition of fiduciary duties, the authors of Snell's Equity (34th ed) state that there is growing judicial support for the following test:

> *"a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."*

150. Equitas contends that this approach was adopted by the Court of Appeal in *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 ("**Mothew**") where Millett LJ (as he then was) stated:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."*

151. It is further said that in the present case, if the Court finds that Senator was not a broker or any agent, the relationship between Senator and Equitas/the Syndicates is nevertheless a relationship that gives rise to a fiduciary duty in relation to Senator's dealings with monies which it collects and holds for the benefit of Equitas/the Syndicates. It is argued that to this extent there is a clear relationship of trust and confidence, where Equitas/the Syndicates relied entirely on Senator to collect monies, to account for such monies and to pay over such monies. As a starting point:

    (1) Senator was appointed as an agent of the brokers: as such it does owe fiduciary duties to the brokers;

    (2) The brokers are agents of the Syndicates and as such they owed fiduciary duties to the Syndicates;

    (3) Where all parties knew that Senator was effectively stepping into the shoes of the brokers, and where the brokers had no ongoing involvement, Senator must have a fiduciary duty to the Syndicates. While it is correct that Senator was a sub-agent, the reality of the situation was that its position was materially identical to the position of the agent and therefore it should owe the same duties.

152. The specific features of the relationship between Senator and Equitas/the Syndicates that are said to give rise to a fiduciary relationship are that:

    (1) The relationship is a long-term continuing relationship in which Senator's role in collecting and remitting funds was central;

    (2) Equitas/the Syndicates were entirely dependent on Senator to account for such payments, particularly given the complex nature of Lloyd's and other London Market payment and settlement procedures;

    (3) Both parties knew that reinsurance claims would be expected to come in and need to be dealt with over a period of years and again Equitas/the Syndicates were entirely dependent on Senator to deal with such claims;

    (4) Senator was under a continuing obligation to maintain accounts and administer the Syndicates' reinsurance policies generally and Equitas had no independent means of verifying the accounts provided by Senator;

    (5) A heavy reliance was placed on Senator by Equitas/the Syndicates in almost every respect.

153. The Defendants' submissions are that Senator was not obligated to either Syndicate by way of fiduciary duties. It was pointed out that Equitas's opening submissions primarily based fiduciary duties on Senator having been an agent, seemingly for the Syndicates, but that that was not what the Biddencare Agreement prescribed. It was agent for the third-party brokers. It is said that Equitas's secondary basis for fiduciary duties, namely "*the nature of the relationship between the parties*", is vague and not tied into the actual facts. The Defendants note that in *Walsham*, while the point was raised (see [38]), Males J did not hold Walsham Brothers & Co Limited (an actual Lloyd's broker and agent) to

have been under a fiduciary duty to account. They further note that the current case is different from *Walsham* because Senator was not a Lloyd's broker and was not in any contractual agency relationship with the relevant Syndicates. It is submitted that in the absence of contractual obligations giving rise to agency, the existence of fiduciary duties is uncommon and that the Claimants have made no attempt to articulate a basis for Senator having owed fiduciary duties in this case or the precise contents of the fiduciary duty alleged to give rise to the remedy of an account. Further, it is said that a duty to account for monies, even in relation to a person who is a fiduciary, is not itself a fiduciary duty relying on *Coulthard v Disco Mix Club Ltd* [2000] 1 WLR 707.

154. I turn now to determine whether Senator owed a fiduciary duty to the Pateman and Cotesworth Syndicates or Equitas as their assignee. I have already concluded that Senator was not in a contractual relationship with the Pateman or Cotesworth Syndicates or with Equitas (see paragraph [136] above). Pursuant to the Biddencare Agreement, it was collecting monies as an agent for the third party brokers, including Dewey Warren, not as agent for the actual syndicates (who were the Insurance Creditors under the Biddencare Agreement). It was therefore a sub-agent. It was not a Lloyd's broker and was not bound by the Lloyd's Code of Practice: see paragraph [108,109, 113] above. It was not fully administering the operations or run-off of any third party broker; rather its obligations were limited to those set out in relation to Dermavale (which sub-contracted them to Senator) in the Biddencare Agreement. Senator's contractual obligation to collect depended on Dermavale or Senator considering the collection to be reasonably practicable and economically prudent and was not therefore absolute in nature, although where those conditions were satisfied, it was under a contractual obligation to collect the Insurance Debts.

155. The payments at issue here were reinsurance monies. When received by Senator, it was not required to and did not in fact deposit the monies collected in an IBA but rather in an unsegregated account. I have concluded at paragraphs [221]-[231] below for the reasons there set out that the monies collected were not impressed with a trust and that the Syndicates did not have beneficial title over the monies.

156. Senator was contracted to Dermavale which was acting as agent for Dewey Warren. Dermavale and/or Senator may have owed fiduciary duties to Dewey Warren as its agent, but that does not of itself mean that that Dermavale or Senator owed fiduciary duties to third parties, such as Dewey Warren's clients. I have already concluded that Senator did not fully step into Dewey Warren's shoes such that the role of the two was indistinguishable, but rather undertook to perform certain functions on its behalf. Its obligations were delineated by the Biddencare Agreement and were more limited than those undertaken by Dewey Warren to the Syndicates who were its clients.

157. Further, even if the nature of the relationship between Senator and the Syndicates could be said to be a fiduciary one, that would not mean that all its duties were fiduciary duties. Any contractual or tortious (non-fiduciary) duties would remain, with certain duties peculiar to fiduciaries being added to its other obligations, breaches of which would attract legal consequences differing from those consequent upon the breach of other duties: see *Mothew* at p 16C-D (per Millett LJ). Those fiduciary duties are traditionally

proscriptive: they proscribe conduct rather than prescribe it. A duty on a fiduciary to exercise reasonable skill and care is not a fiduciary duty. *Hilton v. Barker Booth & Eastwood* [2005] UKHL 8; [2005] 1 WLR 567 at [29]. Any obligation on Senator to take reasonable care to remit sums would not have been a fiduciary duty. A breach of fiduciary obligation connotes disloyalty or infidelity. Incompetence/negligence is not enough: *Mothew* at p 18F. To breach a fiduciary duty conduct need not be dishonest but it must be intentional: *Mothew* at p 19E-F.

158. In relation to whether a duty to account is a fiduciary duty, Mr Jules Sher QC sitting as a Deputy High Court Judge in *Coulthard* at p.728 held as follows:

> *"It was accepted in Nelson v Rye , so far as I can see, that because Mr. Rye was in a fiduciary position, all duties owed by him were fiduciary duties and any breach of them was a breach of fiduciary duty. This is quite wrong. Very few of the duties owed by a manager in the position of Mr. Rye are fiduciary duties. They are, essentially, the duties of loyalty and fidelity. As Millett L.J. said in Bristol and West Building Society v Mothew [1998] Ch. 1, 18:*
>
> > *'This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.'*
>
> *Such is the true scope of fiduciary responsibility. All other duties, important and central though they may be, are not fiduciary duties. Accordingly, for example, the simple duty to account, central though it is, is not a fiduciary duty: it is a contractual duty; and breach of it gives rise to a claim which would be governed by section 5 of the Act of 1980.*
>
> *Most, therefore, of the claims in the many sub-paragraphs of paragraph 36 are statute barred. Despite the express allegation of breach of fiduciary duty, the claims are, simply, claims for breach of contract and no more. The Act of 1980 cannot be sidestepped by describing them as claims in breach of fiduciary duty (even if, which is another matter entirely, claims in breach of fiduciary duty are not controlled in any way by the Act of 1980).*
>
> *In Nelson v Rye [1996] 1 W.L.R. 1378 it appears to have been agreed between the parties that the claim to an account was based on a breach of fiduciary duty. Had the analysis above been applied, the limitation defence would have succeeded without much more to say.*"

Accordingly, even had Senator been an agent of the Syndicates with a direct obligation to account to them for the monies it held in relation to which they were Insurance Creditors, that duty would not have been a fiduciary obligation.

159. I conclude that Equitas has not established that Senator owed fiduciary duties to the Pateman or Cotesworth Syndicates or to Equitas itself and/or that an obligation to account for the monies it received from reinsurers was itself in the nature of a fiduciary obligation.

Restitution – unjust enrichment

160. Equitas submits that Senator and/or Sande Investments and/or Dermavale and/or Senator Insurance Holdings have been unjustly enriched at the expense of Equitas. Although a personal claim for money had and received was pleaded and referred to in passing in Mr Benzie's written opening, it was not the subject of any submissions by Equitas in closing at the trial, and accordingly, I will proceed on the basis that the restitutionary claim is limited to unjust enrichment which was the sole subject of the legal submissions. Equitas contends that it is irrelevant that the funds by which the Defendants were enriched were not paid by Equitas. Equitas relies on *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] AC 275 ("***Investment Trust***") and the holding of the Supreme Court at [51] that:

> *"There are also situations where the defendant receives property from a third party into which the claimant can trace an interest. Since the property is, in law, the equivalent of the claimant's property, the defendant is therefore treated as if he had received the claimant's property."*

161. It is said that consequently:

(1) Monies were paid to Senator that were for the benefit of the Syndicates;
(2) By retaining those monies, Senator was unjustly enriched at the expense of the Syndicates;
(3) Mr Nugent accepted that monies were paid by Senator to Dermavale in 2005 and thereafter monies were paid to Senator Insurance Holdings. Each of these parties were also unjustly enriched;
(4) Further, the accounting documents also show that monies were transferred to Sande Investments: again it was unjustly enriched at the expense of Equitas;
(5) Mr Nugent denied that any significant dividend had been paid out and as such the money that was due to the Syndicates is still within the Senator Group.

162. Mr Benzie on behalf of Equitas produced an analysis of the abbreviated accounts of the relevant Defendants. These can only show snapshots of what monies existed in each company at its year end. These show that in 2005, Senator's 'cash at bank' was some £1,082,110 less than it had been at the previous year end, and that Dermavale's 'cash at bank' was higher than the previous year end by a figure of £936,248. In 2009, Dermavale's 'cash at bank' was higher compared with the previous year from £1,100,743 to £1,953,225. In 2010, Dermavale's 'cash at bank' was £2,994,999. Mr Nugent's evidence was that the bulk of the money coming into Dermavale was from the Seventh Defendant. In 2013, Dermavale's 'cash at bank' was £901,539. Mr Nugent's evidence was that the payments out from Dermavale had been payments of dividends made to its

parent company, Sande Investments. At the 2014 year end, Dermavale's 'cash at bank' was £86,724. Mr Nugent's evidence was that he assumed the fall compared with the previous year end was a dividend paid to Senator Insurance Holdings. In 2015, Senator Insurance Holdings 'cash at bank' was £1,232,786 (whereas at the 2012 year end it had been £746,919). In 2016, Senator Insurance Holdings' 'cash at bank' was £575, whereas it had previously been £1,190,786. Mr Nugent's evidence was that it was possible there was a dividend that had been paid to Sande Investments. In 2016, Sande Investments 'cash at bank' was £504,326, compared to £43,173 in the previous period. Mr Nugent considered that the money may have been a dividend from Senator Insurance Holdings or the Second Defendant or Sande Property Holdings. At the 2017 year end, Sande Investment's 'cash at bank' was £211,830. At the 2018 year end, it was £39,443.

163. The Defendants' submissions are that Senator was not obligated to either Syndicate in restitution. Both are said to have arisen as a result of Senator not remitting the money and thereby being unjustly enriched. In *Walsham* at [134], Walsham Brothers & Co Limited conceded the restitution claim, subject to limitation arguments. It is suggested by the Defendants that the concession was probably made because Walsham was an actual Lloyd's broker, in contract with and an agent of the syndicates, and, generally, an agent has a duty to account to his principal for money received on the principal's behalf. However, as I have already concluded, Senator was not a Lloyd's broker, or in contract with or an agent of the relevant Syndicates. It was contracted to Dermavale with an obligation to account to Dermavale which was obliged to account to the relevant third-party broker, here Dewey Warren.

164. On the facts, Senator received monies from reinsurers. If it was unjustly enriched then it was at the direct expense of reinsurers and not at the Syndicates or Equitas's direct expense: *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275. The Defendants refuted the contention that the monies collected were the Syndicates' property.

165. I turn now to consider whether Senator or the other three remaining Defendants are liable to Equitas in restitution. In *Investment Trust*, the Supreme Court held that a consumer did not have the right to bring a common law claim of unjust enrichment directly against HMRC after overpaying VAT to a supplier as a result of a mistake of law, in part because the supplier's liability to account for VAT to HMRC arose independently of the consumers' liability to the supplier and there was no single transfer of value from the consumer to HMRC. The Supreme Court reviewed the law on unjust enrichment. As identified at [24], both parties had followed the approach adopted by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 and asked: (a) Has the defendant benefited, in the sense of being enriched? (b) Was the enrichment at the claimant's expense? (c) Was the enrichment unjust? (d) Are there any defences? In relation to element (b) the Court concluded that decisions concerning the question whether an enrichment was "*at the expense of*" the claimant demonstrated uncertainty as to the approach which should be adopted. The relevant passages are as follows:

> "*43. The nature of the various legal requirements indicated by the "at the expense of" question follows from that principle of corrective justice. They are designed to ensure that there has been a transfer of value, of a kind which may have been normatively defective: that is to say, defective in a way which is recognised by the law of unjust enrichment (for example, because of a failure of the basis on which*

> *the benefit was conferred). The expression "transfer of value" is, however, also too general to serve as a legal test.* ***More precisely, it means in the first place that the defendant has received a benefit from the claimant. But that is not in itself enough. The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant's also having suffered a loss through his provision of the benefit.***
>
> *47* ***There are, however, situations in which the parties have not dealt directly with one another, or with one another's property, but in which the defendant has nevertheless received a benefit from the claimant, and the claimant has incurred a loss through the provision of that benefit. These are generally situations in which the difference from the direct provision of a benefit by the claimant to the defendant is more apparent than real****.*
>
> *48* ***One such situation is where the agent of one of the parties is interposed between them. In that situation, the agent is the proxy of his principal, by virtue of the law of agency.*** *The series of transactions between the claimant and the agent, and between the agent and the defendant, is therefore legally equivalent to a transaction directly between the claimant and the defendant. Similarly, where the right to restitution is assigned, as in Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton (2012) 246 CLR 498, the claimant stands in the shoes of the assignor, and is therefore treated as if he had been a party to the relevant transaction, and the defendant's enrichment had been directly at his expense. Another situation is where, as in the Relfo case [2015] 1 BCLC 14, an intervening transaction is found to be a sham: para 121. Since the sham is created precisely in order to conceal the connection between the claimant and the defendant, it is disregarded when deciding whether the latter was enriched at the former's expense. So, in the Relfo case, Gloster and Floyd LJJ described the arrangements in question as being "equivalent to a direct payment": paras 103, 115. There have also been cases, discussed below, in which a set of co-ordinated transactions has been treated as forming a single scheme or transaction for the purpose of the "at the expense of" inquiry, on the basis that to consider each individual transaction separately would be unrealistic.* ***There are also situations where the defendant receives property from a third party into which the claimant can trace an interest. Since the property is, in law, the equivalent of the claimant's property, the defendant is therefore treated as if he had received the claimant's property****.*
> *…*
>
> *51.* ***Where, on the other hand, the defendant has not received a benefit directly from the claimant, no question of agency arises, and the benefit does not consist of property in which the claimant has or can trace an interest, it is generally difficult to maintain that the defendant has been enriched at the claimant's expense****.*" (emphasis added)

166. In the present case, the sums received by Senator were from reinsurers, not from the Syndicates. The issue arises as to whether there has been a transfer for value in the sense that Senator received a benefit at the expense of the Syndicates/Equitas and the Syndicates/Equitas suffered some form of economic loss through provision of the benefit? Based on the law as it stands, in my judgment, the answer to that question is no. The benefit to Senator was paid by and at the expense of the reinsurers. Although the

sums in question were, pursuant to the Biddencare Agreement, contractually intended by Senator, Dermavale, Biddencare and Dewey Warren to be applied to satisfy the debt of the reinsurers to the Syndicates, this does not constitute enrichment "at the expense of" the Syndicates or Equitas. Whilst restitution was conceded in *Walsham*, in this case, Senator was not - in contradistinction to Walsham Brothers & Co Limited - the agent of the Syndicates. The current case does not fall within the situations described in *Investment Trust*.

167. Accordingly, unless the benefit consists of property in which the Syndicates/Equitas have or can trace an interest, it cannot be shown that Senator has been enriched at their expense. Such a claim was not pleaded by Equitas but was nonetheless raised and argued at trial. For the reasons set out at paragraphs [221]-[231] below, I have determined that Equitas has not established that the monies were subject to a trust or otherwise 'belonged' to them such that a proprietary tracing claim is available.

168. The same applies to Sande Investments, Dermavale and Senator Insurance Holdings insofar as they received sums originally held by Senator.

(2) Breach

Whether sums claimed were collected and not remitted

169. I turn now to consider the issue of whether, had I held that a contractual, tortious, or fiduciary duty was owed, there would have been a breach of it. This is also relevant to whether Senator was enriched for the purposes of unjust enrichment (leaving to one side the issue of at whose expense). In light of the Defendants' non-admissions in their Defence, it is accepted by Equitas that it must prove that the amounts which it claims were in fact collected and not remitted to Equitas.

170. Equitas contends that its evidence on the point is clear and is not realistically challenged. It is asserted that Senator collected monies that were due to the Syndicates/Equitas using its broker code 450SEN, the Defendants do not deny the monies were collected and the use of broker code 450SEN demonstrates that it was Senator that made those collections.

171. Equitas places reliance on the principle of *omnia praesumuntur contra spoliatorem*, a Latin maxim meaning "all things are presumed against the wrongdoer". In *Malhotra v Dhawan* [1997] 8 Med LR 319, the principle was stated as follows: "*where one party is responsible for the unavailability of relevant evidence, the Court should not be slow to make such inferences or assumptions against that party's interest as are consistent with other available evidence*", although it is accepted by Equitas that the principle is narrower than that statement suggests. Equitas contends that the Defendants should not be able to evade liability for the receipt of funds (and any profits thereon) because of their failure to provide any proper account of their possession and use of those funds.

172. As already identified, the relevant period during which sums were collected was 1998 to December 2004. Mr Luben in his evidence detailed that he used the LPSO 2010 Download to identify the LPSO original premium signing numbers and dates relating to the Pateman contract and then extracted the payment history of the contract. He then checked each transaction individually. He searched the LORS 2002/2003 Download for the relevant reinsured syndicates for the relevant contract. He was able to ascertain what

had been paid by reinsurers to Dewey Warren/Senator and what had been paid on to the Reinsured Syndicate.

173. The Defendants challenged the original calculation of the amounts, and this led to the quantum of the claim being amended during the trial. Their position was that Senator transferred all insurance files relating to this book of business to Equitas between 2006 and 2009. It no longer has any records which might enable it to identify whether or not it received the sums claimed by Equitas (save to the extent that this can be derived from documents provided to Equitas), or what happened to any such funds which it did receive. It has also been unable to obtain any banking records for the period 1992 to 2004 from its former bank. The Defendants criticise the documentary evidence relied upon by Equitas as secondary data. It is said that generally not all underlying information has been considered. The best evidence of whether a syndicate had received funds would have been its bank statements and yet they have not been disclosed. No claims file or accounting documents for Cotesworth have been disclosed such that it is not possible to locate requests for payments by Senator or any of the Defendants, or any collection notices, or to cross-check any figures. It is noted that Mr Luben's first involvement with Senator or the Dewey Warren files or the Pateman or Cotesworth contracts was not until 2018. It was suggested that Mr Luben was not a proper substitute for a forensic accountant and, given that he worked for Equitas, he inevitably lacked independence. Mr Luben accepted in his evidence that he had made certain presumptions and that mathematically these favoured Equitas. The Defendants pointed out that Mr Luben's evidence was shown not to have been wholly accurate. It was suggested there might therefore be other errors. It was noted that, for example, Mr Luben was unable to explain a manuscript note on one particular document recording that £44K and $339K had already been settled.

174. On the basis of the totality of the evidence available, which is clearly incomplete, on the balance of probabilities, I find that the amounts now claimed by Equitas (set out at paragraph [5] above) were collected by Senator and not remitted to Equitas. Whilst there were some errors in Mr Luben's calculation, these were not major in nature and were corrected. No further errors were identified. Senator and Dermavale are unable to provide any further records. I do not consider that the fact that Mr Luben was not a forensic accountant or worked for Equitas undermined his calculations which were essentially a mathematical exercise. Having heard his evidence, I have concluded that he was an honest witness who did his best to investigate the payments and set out his findings. He did not come across as either insufficiently competent to perform that role or as biased towards Equitas. He was candid about the errors which had been made and sought to correct the position. The Defendant cannot and has not positively denied that the sums in question were not remitted. Although the point cannot be overstated since it was not clear what sort of sums the 5% or 10% commissions earned by Senator would have translated to in actual money, the 'cash at bank' sum shown in Senator's accounts at the 2004 year end, of over £1million, which was then transferred to Dermavale, would appear to be consistent with collections having been retained by Senator.

175. In addition, Mr Webb's statements in his email to Charles Russell LLP in May 2011 (at paragraph [71] above) support the general proposition that some sums had been collected by Senator and not remitted, albeit not identifying the specific sums which are the subject of this claim. He stated that "*Needless to say that if I were to review the transferred files I would by past knowledge recognise those files and in the process of auditing the files I*

would recognise on discovery that in certain instances funds have been recovered by Senator and not passed on to Resolute…The problem I have is that I cannot dismiss certain knowledge held in my brain concerning instances of funds being collected whilst I was employed by Senator and not being passed on for whatever reason. These funds are due to the respective clients and are not the property of Senator…". As I have identified, Mr Webb did not give evidence. Mr Nugent, who had only seen this email a day or so before the start of the trial gave evidence that he was stunned as his understanding had been that Mr Webb, who had been handling the files, had dealt with everything when he left. Mr Nugent said he thought it was all resolved in 2009. I accept that evidence on the part of Mr Nugent. However, Mr Webb's email clearly suggests the existence of unremitted monies. I do not consider that resort needs to be had to the maxim *omnia praesumuntur contra spoliatorem* in order to so hold.

176. Accordingly, if I had held that a duty was owed by Senator to the relevant Syndicates/Equitas, I would have found Senator to be in breach of it in having collected but failed to remit the sums claimed.

177. A further issue arises as to when those sums should have been remitted. Clause 3(ii) of the Biddencare Agreement does not specify a time when each amount so collected should be applied in settlement of the amount due to the related Insurance Creditor. Accordingly, I conclude that the sums should have been remitted within a reasonable time following their collection. In my judgment, this would have been, at most, a period of say two months following the date of collection. The relevant date will of course differ for each of the individual payments set out at paragraphs 19 and 20A of the Amended Particulars of Claim, the earliest of which is April 1998 and the latest, December 2004.

(3) Limitation

Are the claims time barred under ss 2 and/or 5 Limitation Act 1980?

178. I have concluded above that Equitas has not established any legal basis for its claims against Senator. However, even if such did exist, Equitas would still have to establish that the claims are not statute-barred. The claimed monies are alleged to have been collected between April 1998 and December 2004. The latest date upon which a breach of duty is alleged in the Amended Particulars of Claim is December 2004.

179. As to the periods of time in which claims based upon those causes of action ought to have been brought, it is common ground that:

(a) the time period for all causes of action founded on simple contract was *prima facie* 6 years from the dates of accrual: see section 5 of the Limitation Act 1980;
(b) the time period for all causes of action in tort was *prima facie* 6 years from the dates of accrual: see section 2 of the Limitation Act 1980;
(c) the time period for all causes of action for breach of fiduciary duty was *prima facie* 6 years from the dates of accrual by analogy: see *Cia De Seguros Imperio v. Health (REXB) Ltd* [2001] 1 WLR 112; *Gwembe Valley Development Company v. Koshy* [2003] EWCA Civ 1048 [2004] 1 BCLC 131 at [111];
(d) in this case all causes of action in restitution would fall to be regarded as "founded on simple contract" such that the time period for all causes of action in restitution was prima facie also 6 years from the dates of accrual: see *In Re Diplock* [1948] Ch 465 at p 514 (per Lord Greene MR); *Aspect Contracts*

> *(Asbestos) Ltd v. Higgins Construction plc* [2015] 1 WLR 2961 at [25] (per Lord Mance, with whom the other members of the Supreme Court agreed, and section 5 of the Limitation Act 1980.

180. If, contrary to my conclusions above, the Syndicates/Equitas had causes of action against Senator (1) in contract (2) in negligence (3) for breach of fiduciary duties and/or (4) in restitution, they all accrued on the same dates, namely the dates when any specific remittance ought to have been made, which, as I have concluded at paragraph [177] above, would have been at the latest within 2 months of collecting the sum in question. On those dates: (1) Senator would have breached any applicable contract with the relevant Syndicate; (2) Senator would have breached any applicable fiduciary duty; (3) Senator would have been holding monies it had collected for the purposes of any claim in restitution; and (4) the relevant Syndicate would have suffered damage for the purposes of any duty of care in tort.

181. Further, given that an order for an account is a remedy, all claims for accounts are *prima facie* also subject to a time limit of 6 years because they are subject to the same time limits as the claim which forms the basis of the alleged duty to account, pursuant to section 23 of the Limitation Act 1980.

182. Since Equitas's claim was not issued until 19 January 2019, subject to the issue of continuing obligations and provisions postponing the commencement of time running for limitation purposes addressed below, the claims are statute-barred.

Continuing duties?

183. Equitas submits that the question of whether a party has continuing obligations is not a question of the label attached to a relationship (such as a Lloyd's broker) but is dependent on the *features* of that relationship. Equitas contends that in *Walsham*, Males J held that Walsham Brothers & Co Limited was under a continuing obligation not based on its status as a Lloyd's broker, or the express continuing obligations contained in the DAC letter, or the Broker Transfer Agreement: the matters relied upon by Males J were simply the features of the relationship which pointed to the conclusion that the obligation to remit was a continuing obligation. The specific features relied upon were set out at [69]:

> *"The question, therefore, is whether on the facts of the present case there are features of the parties' relationship and of a Lloyd's broker's obligation to collect and remit funds which point to a conclusion that the obligation is after all a continuing obligation. I accept that this case has the features identified by Equitas to which I have referred.* ***The parties' relationship was a long-term continuing relationship in which the broker's role in collecting and remitting funds was central, in which reinsurance claims would be expected to come in and need to be dealt with over a period of years, with the broker under a continuing obligation to maintain accounts and administer the syndicates' reinsurance policies generally, and with heavy reliance known to be placed on the broker by the syndicates. The broker's obligation in essence was to administer the syndicates' accounts in a manner which ensured that the syndicates would not be kept out of funds to which they were entitled****."* (emphasis added)

184. Consequently, the matters relied upon by Equitas in this case were as follows:

(1) The parties' relationship was a long-term continuing relationship in which the broker's role in collecting and remitting funds was central;
(2) The relationship was one in which reinsurance claims would be expected to come in and needed to be dealt with over a period of years;
(3) The broker under a continuing obligation to maintain accounts and administer the syndicates' reinsurance policies generally;
(4) Heavy reliance was known to be placed on the broker by the syndicates.

It was asserted that Senator was the "broker" for this purpose.

185. Equitas also relies on Mr Nugent's evidence. He was asked about the features of the relationship between Senator and the syndicates (whom he described as Senator's "*clients*") and he confirmed that:

(1) Senator was in a long-term relationship with the brokers listed in the Biddencare Agreement – when this was put to him he replied, "*absolutely"*;
(2) Senator collected funds on behalf of the brokers;
(3) Reinsurance claims would occur over time and it would be for Senator to agree and collect those reinsurance claims and Peter Webb would go to the underwriter's office to see the underwriter to agree claims;
(4) Senator was administering the files of the brokers. He also said that: *"Equally when you look at the run-off brokers which are part of the Biddencare Agreement, we were responsible for taking care of all of the files and administering them"*;
(5) He accepted that during the relevant period Senator kept accounts and indeed employed a Mr. Harry Mehta who was "*the insurance accountant who had worked for Peter* [Webb] *for a number of years, he would have kept manual records and spreadsheets*.";
(6) He did not completely accept that the syndicates were entirely reliant on Senator to perform these functions, but when pressed he responded, "*Well, I honestly do not know what the relationship was between Peter and the various syndicates that he did not have agreements with*." Equitas submits that this answer was evasive given that Senator was the only party acting on behalf of the relevant Syndicates.

186. Equitas contends that, as such, the features of the relationship between Senator and the brokers it acted for were materially identical to the relationship in *Walsham* described by Males J at [69]. The conclusion that Walsham Brothers & Co Limited's obligation to remit the funds to the syndicates was a continuing obligation was reached (*Walsham* at [71]) before he went on to consider the relevance of the DAC letter (at [73]) and the Broker Transfer Agreement (at [74]). It is submitted by Equitas that where, even on Mr Nugent's evidence, the actual day-to-day relationship between Senator and the brokers it serviced under the Biddencare Agreement (whether directly or as agent) was materially identical to that in *Walsham* the conclusion must be the same.

187. The Defendants' submissions, in summary, are that any obligation on Senator to remit monies would never have been a continuing one. The Defendants also highlighted various points of distinction from *Walsham*. I will not lengthen this judgment further by summarising them here, given that I address them in detail below. In the further alternative, it is asserted that any continuing obligation would have come to an end in 2004 (when balances were transferred to Dermavale and Senator no longer held monies) or before April 2009 (after all files were transferred to Equitas).

188. I turn now to consider and determine whether Senator was under continuing obligations and whether Equitas is correct that all its causes of action are not time-barred because they accrued within six years of the issue of the claim form on 17 January 2019 (paragraph 6.1 of its Reply) i.e. on the basis that Senator's duties were still continuing as at 17 January 2013. This is based on the contention that a fresh cause of action arose on each day Senator or another Defendant did not make a remittance which Equitas contends ought to have been made.

189. In *Walsham* at [68], Males J accepted that the starting point is that in the case of an obligation to remit funds, such an obligation is likely to require performance once and for all on the due date and that there will not be a continuing duty. He said that whether that general position does not apply depends on the relationship between the parties.

190. Males J's determination in *Walsham* was heavily and decisively influenced by a number of facts present in that case which are not present in this case, including the following:
    (1) Walsham Brothers & Co Limited was a conventional Lloyd's broker, subject to the Lloyd's Code of Practice; see *Walsham* [60] & [69]; I have concluded that Senator was not a Lloyd's broker and was not subject to the Code of Practice: see paragraphs [108,109, 113] above.
    (2) One aspect of that was that Walsham Brothers & Co Ltd had a direct and continuing relationship with the syndicates: see *Walsham* [60] & [69]; Senator did not have a direct relationship with the relevant Syndicates at any time. Any relationship that it might be said to have had with the Syndicates came to an end when it transferred the relevant files to Equitas on the terms it had set out and which Equitas agreed to: see paragraph [59] above.
    (3) Another aspect was that Walsham Brothers & Co Limited's responsibilities extended to the administration of the policies generally - see *Walsham* [60] & [69]; Senator's responsibilities to the Pateman and Cotesworth Syndicates were delineated by the Biddencare Agreement and were clearly not as extensive as that of Dewey Warren or Biddencare.
    (4) As to collections, Walsham Brothers & Co Ltd (as a broker) was found to be under an obligation to the syndicates to collect: see *Walsham* at [47]. The duty was "*to administer the syndicates accounts in a manner which ensured that the syndicates would not be kept out of funds to which they were entitled*" [69]; Senator was not under such an obligation to the Syndicates but was under obligations to Dermavale, in accordance with the Biddencare Agreement, with contractual limitations on its duty to collect: see Biddencare Agreement clause 3(ii).
    (5) Walsham Brothers & Co Limited (as broker) was under a continuing contractual duty to the syndicates to maintain accounts and other records: see *Walsham* [60] & [69]; Senator was under no such obligation to the Syndicates pursuant to the Biddencare Agreement. Its obligation under clause 3(i) was only to "*so far as is reasonably practicable sort out all the files, records and other documents concerning the Insurance Debts*".

191. Males J's decision in *Walsham* was also fortified by factors not present in this case, namely the fact that Walsham Brothers & Co Limited had signed DAC's letter referring to Walsham being under a continuing duty: see *Walsham* [25] & [73]-[74] and had entered into the Broker Transfer Agreement in September 2003 by which Walsham undertook continuing obligations in relation to the period after their role

as broker had ended: see *Walsham* [28] & [75]-[76]. By contrast, Senator was not asked to and did not sign up to any express continuing obligations.

192. I do not accept the Defendants' argument that having failed to remit a sum collected within a reasonable period of, say, two months after collection, that Senator's obligation to do so came to an end at that date and did not continue. Further, I do not necessarily accept that Senator's obligations to remit money it had collected ended when it no longer held any sums after transferring its balances to Dermavale in 2004/2005 prior to becoming a Financial Services Authority authorised and regulated entity. I am not persuaded, given that Mr Nugent and Mr Webb were common directors of both Senator and Dermavale, and they were not, in reality, companies operating at arm's length, that Dermavale could not readily have arranged for Senator's funds to be transferred back to it in order to remit the monies to Equitas. Alternatively, Dermavale, which was under the same obligations as Senator (to whom it had sub-contracted them) under the Biddencare Agreement, could itself have remitted the sums to Equitas.

193. However, I do conclude that any continuing obligation which existed did come to an end when the relevant Syndicates' files were transferred to Equitas's agent (Resolute). The last transfer was no later than March 2009 in relation to all syndicates, including those who used broker Dewey Warren (by letter dated 26 March 2009), and documents relating to the Pateman reinsurance contract were specified. The Pateman reinsurance contract documents and Lloyd's slips were provided. The transfers were made pursuant to a request from Equitas. The request to transfer and the subsequent transfer would have been inconsistent with any continuing obligations thereafter. Further, the terms of the 26 March 2009 letter are material. The terms were signed on behalf of Equitas. They do not point to any continuing duties on Senator at all. Indeed point 5 of the letter provided that *"RSML &/or any successor in title assumes on-going responsibility from the date of transfer for all other matters concerning the files being transferred."* This is in complete contrast with the Broker Transfer Agreement executed in the *Walsham* case which did provide for continuing obligations to remit monies.

194. Accordingly, I conclude that, if I am wrong about the absence of any cause of action by Equitas against Senator, then any continuing obligations owed by Senator came to an end not later than March 2009 when it transferred all of its files to Equitas. Given that this action was commenced on 17 January 2019, all causes of action are time-barred. Indeed, any and all causes of action which accrued prior to 17 January 2013 are time-barred unless Equitas can postpone the start dates of limitation periods under section 32 of the Limitation Act 1980 or invoke section 21(1)(b) of the Limitation Act 1980. If there had been a continuing duty, then while Equitas can recover the sums not remitted, its claims for lost investment income are limited in time to loss as a result of failure to remit during the last 6 years: *Walsham* [77], unless it succeeds on its other limitation arguments.

Section 32(1)(b) Limitation Act 1980

195. There was no disagreement between the parties as to the relevant law in relation to sections 32(1)(b) and 32(2) of the Limitation Act 1980, upon which Equitas relies to postpone time running in relation to its alleged causes of action.

196. Section 32(1) of the 1980 Act provides so far as material for present purposes:

> *"(1) ... where in the case of any action for which a period of limitation is prescribed by this Act,*
>
> *…….*
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant.*
> *…..*
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."*

197. As stated at paragraph [179] above, it is accepted that periods of limitation are prescribed by the Limitation Act 1980 for actions in contract (section 5), in tort (section 2), for breach of fiduciary duty (section 36) and in restitution (section 5). It is also accepted that a "right of action" includes a cause of action (section 38(9)(a)).

198. Section 32(2) provides:

> *"(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."*

199. Thus section 32(1)(b) applies in two sets of circumstances:

(1) where a defendant takes active steps to conceal his own breach of duty after he has become aware of it; or
(2) where a defendant is guilty of deliberate wrongdoing and conceals or fails to disclose the deliberate wrongdoing in circumstances where it is unlikely to be discovered for some time.

See *Cave v. Robinson Jarvis & Rolf* [2003] 1 AC 384 ("***Cave***") at [25] (per Lord Millett) and at [60] (per Lord Scott). In this case, Equitas relies on the second set of circumstances (as pleaded in its Reply at paragraph 6.2(a)).

200. The purpose of section 32 is to postpone time where a claimant lacks sufficient information to plead a complete cause of action either because of actual deliberate concealment of a necessary ingredient or where the relevant breach of duty has been deliberate and there is then deemed deliberate concealment of one or more necessary facts involved in that breach of duty. As to s.32(2), in *Cave*, Lord Scott stated at [60]:

> *"Subsection (2), however, provides an alternative route. The claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the claimant can show that the defendant knew he was committing a breach of duty, or intended to commit the breach of duty—I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach—then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for subsection (1)(b) purposes. I do not agree with Mr*

> *Doctor that the subsection, thus construed, adds nothing. It provides an alternative, and in some cases what may well be an easier, means of establishing the facts necessary to bring the case within section 32(1)(b)."*

The breach of duty for the purposes of section 32(2) must be (i) a breach of duty to the claimant and (ii) one which is sued upon and (iii) one which, but for section 32(2), would be time-barred.

201. The law in relation to discoverability has recently been revisited by judges in a number of cases: *Gresport Finance Limited v. Battaglia* [2018] EWCA Civ 540 ("***Gresport***"); *Granville Technology Group Limited v. Infineon Technologies AG* [2020] EWHC 415 Comm) ("***Granville***"); *DSG Retail Limited v. Mastercard* [2020] EWCA Civ 671 [2020] Bus LR 1360 ("***DSG Retail***"); *Roberts v. The Royal Bank of Scotland* [2020] EWHC 3141 (Comm) ("***Roberts****"*). A number of applicable principles were set out at first instance by Simon J in *Arcadia Brands Group Limited and others v Visa Inc and others* [2014] EWHC 3561 (Comm) ("***Arcadia***") at [23-24] and have been repeated in subsequent cases: see *Roberts* at [35].

202. Time cannot have started to run against a claimant before it was put on notice or ought to have been put on notice of something which merited investigation. *DSG Retail* at [65]-[66] & [69]. The test is objective: *Granville* at [47]. Further, the something needed to trigger an investigation may be specific or more universal in nature. As Foxton J explained in *Granville* at [48]:

> *"There will be many claims when it will be objectively apparent that something "has gone wrong" – where the claimant has lost property, failed to receive something it expected to receive, or suffered an injury of some kind – which event ought itself to prompt the claimant to ask "why?" and investigate accordingly".*

203. Time starts to run for the purposes of limitation when the relevant facts have been discovered and for these purposes "*the authorities establish that a claimant can be said to have discovered a fact when the claimant is aware of sufficient material to be able properly to plead the facts*": *Granville* at [28]. As to the period between when a claimant is first put on notice and when it has sufficient material to be able to properly plead the facts, a claimant is required to start and pursue investigations with reasonable diligence and with a desire to know and investigate. While that does not mean that a claimant has to have done everything possible, it requires a claimant to have done more than merely act reasonably: *Granville* at [40]. The requirement was addressed by Millett LJ in *Paragon Finance Plc v D B Thakerar & Co* [1999] 1 AER 400 at 418b–d:

> *"The question is not whether the plaintiffs <u>should</u> have discovered the fraud sooner; but whether they <u>could</u> with reasonable diligence have done so. The burden of proof is on them. They must establish that they <u>could not</u> have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not*

> *unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."* (emphasis in the original)

204. The precise extent to which a claimant's personal characteristics are to be taken into account in assessing the diligence required is a question of fact in each case (*DSG Retail* at [69]; *Granville* at [49]-[56]), but the courts have tended to apply an objective test, namely how a person carrying on a business of the relevant kind would act if he had adequate, but not unlimited, staff and resources and was motivated by a reasonable but not excessive sense of urgency: *Granville* at [53]. When applying that objective test one assumption to be made is that the claimant desires to discover whether there had been a fraud or deliberate concealment, or mistake, such that that the concept of reasonable diligence carries with it the notion of a desire to know, and indeed, to investigate: see *Law Society v Sephton & Co* [2005] QB 1013 at [116] per Neuberger LJ, a paragraph Henderson LJ (supported by the other members of the Court) agreed with in *Gresport* at [49]. In *Granville* Foxton J accepted at [56] the submission that when assessing reasonable diligence the task is unlikely to admit any substantial distinction between companies which are and are not in liquidation. This was cited without criticism by Vos C (with whom Flaux and Newey LJJs agreed) in *DSG* at [68] and appears to have been accepted: see [69]. Thereafter, it is a question of fact in each case whether a claimant can show that it could not with reasonable diligence have discovered the relevant concealment before a certain date: *Gresport* at [50].

205. Where section 32(1)(b) applies, time starts running against a claimant once it knows or could with reasonable diligence have discovered those facts essential to make a cause of action complete and which, if pleaded alone, would constitute a prima facie case and valid claim. It is irrelevant whether or not the claimant later learns of other matters which strengthen his case. This is sometimes referred to as the "statement of claim test": see *Arcadia Brands Group Ltd v Visa Inc.* [2015] EWCA Civ 833 [2015] 2 CLC 437 at [30] & [49]. The burden is on the claimant to show that it did not discover and could not with reasonable diligence have discovered "*the concealment*" until "*the period of time within six years prior to the issue of these proceedings*": *Gresport* at [41].

206. In relation to section 32, Equitas submits that:

    (1) Senator deliberately concealed its wrongdoing from the Syndicates/Equitas;

    (2) Equitas could not have discovered facts that would have allowed it to plead its claim against the Defendants acting with reasonably diligence before the conclusion of its enquiries in July 2014. It is said that in reality, the cause of action was not capable of being pleaded until Equitas established loss at some date after July 2014. It acted as promptly as it could, given the sheer scale of the task undertaken in the face of a total lack of cooperation from the Defendants.

207. The Defendants' submissions were that Equitas cannot rely upon s.32(2) of the 1980 Act to postpone the limitation period because (a) Equitas do not show that the matters complained of would have been deliberate breaches and/or (b) that Equitas could not with reasonable diligence have discovered by 17 January 2013 the facts involved in the alleged breaches, namely that the sums had been collected but not remitted. The Defendants point out that in the Amended Particulars of Claim (paragraph 27) Equitas did not plead that the breaches of duty alleged had been deliberate. The allegation that

breaches were "*deliberate*" appears only in the Reply (at paragraph 6.2) and then only in relation to section 32 of the 1980 Act. It noted that deliberate breach was not put to any of the Defendants' witnesses. It is said that there is absolutely no evidence of deliberate wrongdoing. The matters complained of would be omissions to act which typically happen by oversight for one reason or another. Equitas has not identified who would have had to have caused the omissions to happen and who it alleges would have acted deliberately. The evidence was that the claims collection was being overseen by Mr Webb with assistance from Christine Pate and that bookkeeping was being undertaken by Harry Mehta. There is no evidence that any person was aware that any sum was due on a given date or by a given date such that they would have been aware of any specific date for compliance. The pleaded case is only that the allegation was to pay "promptly" which in terms of dates is uncertain. In relation to each sum alleged not to have been remitted, it is said that there is no evidence in relation to any sum that any one of Senator's servants or agents intended Senator to commit a breach of duty, or knew at any material time that Senator would be committing a breach of duty. Senator kept manual records. As Mr Nugent stated: *"Peter [Webb] relied upon various handwritten ledgers and rudimentary spreadsheets to analyse the figures and then if he could, locate the broker's file amongst the large number of boxes [Senator] had acquired. It was all done on pen and paper".* Mr Langley's evidence is that Mr Webb was not the most meticulous administrator. In later years he had a computer but rarely used it. He also had limited files. There were plainly opportunities for errors. Accordingly, there existed other natural and more obvious reasons for non-payment, including administrative errors. This is not a case where Senator did not remit any sums. It made substantial payments such that the more natural and reasonably inference is that no remittances were not deliberate breaches. The alleged errors run both ways. The Claimants' pleaded case includes admissions that reinstatement premiums were paid to reinsurers without corresponding debits being made against Pateman: Amended Particulars of Claim paras 19(7) - 19(10). Prompt payment does not appear to have been a practice of brokers. Numerous brokers appear not to have remitted some monies, hence the cash flushing project. Equitas does no more than invite the court to draw inferences of deliberate wrongdoing in relation to each and every sum of money from the mere fact that money may not have been, or was not paid over, to the Pateman or Cotesworth Syndicates (as applicable). It is said that there is no proper basis for such inferences, which are in any event countered by the above. In relation to discoverability, it was submitted that the fact that Equitas are assignees should also be ignored such that the fact that Equitas may have been dealing with and investigating very many files whereas the Syndicates had many fewer files to investigate should not be material.

208. I turn now to determine whether Equitas is entitled to rely upon section 32 of the Limitation Act 1980 to postpone time running.

209. The alleged fact which is said to have been deliberately concealed was Senator having not remitted to the relevant Syndicate one or more reinsurance pay-outs (due under one or more reinsurance contracts to the relevant Syndicate) which it had collected.

210. There is no evidence from anyone associated with collecting or remitting the sums at issue in this claim (e.g. Mr Webb, Ms Pate, Mr Mehta) as to the reasons for the default in remitting each of the sums received during the relevant period of 1998 to 2004. An

assertion of deliberate breach was not put to those witnesses who were called by the Defendant. Whilst Mr Webb's email to Charles Russell LLP (see paragraph [71] above) might suggest that there had been some form of deliberate or discreditable conduct in not remitting sums, I am not prepared to make such a finding when this has not been put to him and he has had no opportunity to respond to it. In circumstances which permit of other explanations, it is, in any event, a finding that would require cogent evidence, reflecting the principle that the court's conventional perception is that it is generally not likely that people will engage in such conduct: *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [1438-1439] per Andrew Smith J). The fact that the Broker Cash Flushing Project was commenced and pursued by Equitas suggests that there was a general issue over monies in the hands of brokers not being remitted to syndicates promptly or, in some cases, at all. The reasons for such non-remittances have not been identified but there was no suggestion that there was deliberate wrongdoing on the part of every broker who had failed to remit sums at the time they should have done. Similarly, I do not consider that I can infer that the conduct in this case amounted to deliberate concealment on the limited evidence before me. Accordingly, I conclude that Equitas has not discharged the burden on it of proving that Senator was guilty of deliberate wrongdoing and concealed or failed to disclose the deliberate wrongdoing in circumstances where it was unlikely to be discovered for some time.

211. In relation to the issue of discoverability, Equitas was aware from 1997 that Senator had been, since 1992, collecting claims. By the time of the DAC letter in April 2003, Equitas was aware that generally brokers had collected monies but not remitted all of those monies to syndicates or Equitas. In 2005, Equitas commenced the Broker Cash Flushing project. Senator had transferred some of its files in relation to Dewey Warren to Equitas by 25 August 2006. By March 2009, all the Dewey Warren files had been transferred to Equitas, at Equitas's request. The files were received on agreed terms that Equitas would notify Senator of any allegations, claims or actions of any nature whatsoever, which might be made against Senator in respect of any alleged act, error or omission by Senator directly or indirectly relating to the files being transferred. That would include the allegations made in the current claim. By 2010 at the latest, Equitas was investigating collections that had been made by Senator but allegedly not paid to Equitas, including by the email dated 15 June 2010 in relation to the Pateman contract 852495 and Dewey Warren, which enquired about various sums which are the subject of the present claim (see paragraph [67] above). Mr Luben accepted in evidence that this email showed that someone had been investigating the Pateman contract and that the reasonable inference was that it had been identified that not all monies had been remitted. By the end of 2010, Equitas was in possession of all the LORS, CLASS and LPSO data that it subsequently used in 2018 to investigate the claim in relation to the Pateman Syndicate. Mr Luben's evidence is that he dealt with his investigation to work out whether or not sums were missing in relation to both the Pateman and Cotesworth contracts within a couple of days in each case. He accepted in cross-examination that if he had been asked at the end of 2010 to do what he was asked to do in 2018, it would have taken the same amount of time. In April 2011, Mr Marsland was writing internally "*Feel now as though I should have been more proactive on this*" (see paragraph [70] above) which is a clear recognition of delay in following up the issue of what Senator owed. Despite that email, Mr Marsland's email of 15 June 2010 was not followed up until 1 November 2012. I note that in relation to the Seventh Defendant, which had not handed over all its files by April 2009 and continued to operate independently as a broker, according to Mr Langley, Equitas was able to provide in 2012 spreadsheets of amounts they thought were due or

might be due from it. There would seem to be no good reason why Equitas could not have done the same in relation to Senator. The claim in the *Walsham* case was commenced on 9 September 2011. I am unable to identify any good reason why the claim in the present case could not have been issued at a similar time period. I do not accept that it could not have discovered facts that would have allowed it to plead its claim against the Defendants acting with reasonable diligence before July 2014. It had discovered that there existed apparently unremitted sums by 15 June 2010 at the latest.

212. I conclude that in relation to the Pateman contract, Equitas knew there was an issue in or before June 2010; they had all the data they ultimately used at least by the end of 2010, and could have undertaken in a few days in 2010/2011 what they only undertook some 8 years later in 2018. In relation to the Cotesworth contract, Equitas have not disclosed when they obtained the file or started reviewing it, and so have not discharged the burden on it of proving it did not discover and could not with reasonable diligence have discovered the facts concealed until July 2014 (or at any rate after January 2013). However, it was only the Pateman contract that led it to instigate the proceedings, with the Cotesworth claim being added by amendment subsequently.

213. I do not accept that Equitas acted as promptly as it could. Whilst it was faced with a large scale task in relation to the brokers' market as a whole and this factor might be relevant to when it was put on enquiry that the issue of whether or not Senator had remitted all sums merited investigation, it does not appear to me to be relevant to the exercise of reasonable diligence once Equitas *was* on notice that Senator had not or might not have remitted all sums (by analogy with *Granville* at [56], cited in *DSG Retail* at [67-69] without disapproval). In any event, the investigation in relation to the subject matter of this claim, on Mr Luben's evidence, only took a matter of days. I acknowledge that there was a general lack of response from Senator and Mr Langley to Equitas's enquiries, which does not reflect well on Senator's conduct in relation to Equitas, but the lack of response does not of itself mean that Equitas can be said to have acted promptly. Equitas was very slow in chasing up failures to respond to its enquiries. Further, this claim was ultimately issued despite lack of cooperation or response from the Defendants on the basis of material already in the possession of Equitas by the end of 2010 and without any additional material from Senator or the other Defendants. There is no reason, therefore, why the same claim could not have been issued much earlier on the basis of the same material.

214. For these reasons, I conclude that Equitas cannot rely on section 32(1)(b) and 32(2) of the Limitation Act 1980 to postpone time running in relation to its alleged causes of action.

Section 21(1)(b) Limitation Act 1980

215. I turn now to section 21 of the Limitation Act 1980 which provides, so far as material for present purposes, as follows:

> *"(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—*
>
> *(a) …*

> *(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.*"

Section 21(3) provides:

> *"Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."*

Section 38(1) provides:

> *""trust" and "trustee" have the same meanings respectively as in the Trustee Act 1925".*

Section 68(17) of the Trustee Act 1925 provides:

> *""Trust" does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee."*

216. Equitas accepts that section 21(1)(b) of the Limitation Act 1980 is limited to actions by beneficiaries of trusts. It is alleged that Senator was a *de facto* trustee, being a person who is a trustee under a trust implied from the common intention to be inferred from the conduct of the parties, but never formally created as such. Equitas relies on *Williams v. Central Bank of Nigeria* [2014] AC 1189 ("***Williams***"). At [9], Lord Sumption referred to such trustees as follows:

> *"It is clear that Lord Selborne LC regarded as a constructive trustee any person who was not an express trustee but might be made liable in equity to account for the trust assets as if he was. The problem is that in this all embracing sense the phrase constructive trust refers to two different things to which very different legal considerations apply. The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been;* ***or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such****. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed.* (emphasis added)

217. Equitas submits that when Senator took possession of monies from reinsurers, it did so in circumstances where it was clear that Senator's only purpose in taking possession of those funds was to pay it to the relevant Syndicate, relying on Mr Nugent's evidence. It is stated that in those circumstances, it is clear, that the intention of all the parties to the transaction is that: (1) that the payment made by the reinsurer would be applied to the syndicate to discharge the debt owed by the reinsurer to the Syndicate; and (2) that Senator would be precluded from using the funds for any other purpose. Consequently, Equitas submits that there was an express trust in the form of a '*Quistclose*' trust which is a trust of the type described by Lord Sumption in *Williams* as trust that is "…*implied from the common intention to be inferred from the conduct of the parties, but never formally created as such."* As such, following Lord Sumption's analysis, Senator was a "*de facto trustee"* under such an express trust and consequently the terms of section 21(1)(b) apply to its dealings with trust property. Equitas then submits that there need not be an intention to create a trust relying on *Twinsectra Ltd v Yardley* [2002] 2 AC 164 and contends that the focus is on whether the parties intend the money to be at the free disposal of the recipient. Equitas further relies on *Re Margaretta Ltd* [2005] BCC 506 as recognition of the possibility of an express trust coming into existence as a consequence of a commercial transaction, where the beneficiary was the intended recipient of the money (i.e. the beneficiary of the 'purpose' of the trust). Consequently, Equitas submits that there was, here, an express trust of the type described by Lord Sumption in *Williams* and as such the provisions of section 21(1)(b) are engaged. In a post-trial note, Equitas addressed the legal effect of the fact that Senator did not hold the funds collected from reinsurers in segregated accounts. It was submitted that this was not determinative in considering the intention to create a trust. The presence of segregated funds is strong evidence of the intention to create a trust but the absence of segregated funds does not prevent a trust arising where there is evidence that the parties objectively intended to create a trust over the funds: *Twinsectra* at [70-72]; *Cooper v PRG Powerhouse Limited (in liquidation)* [2008] BCC 588 at [16]. Senator's subjective intention is irrelevant (*Twinsectra* at [71]). Consequently, where Senator was, on the evidence, the only party that was aware that it was using an unsegregated account, the matter is irrelevant. It is further said that where all the parties (reinsurer, Senator and the Syndicate) knew that, as a matter of fact, Senator was acting as an agent of a Lloyd's broker (i.e. Dewey Warren), objectively all parties would have proceeded on the basis that the money would be collected and applied in the usual way i.e. into a segregated account. It is said that the fact that the usual method of payment is a segregated account is a powerful factor that the monies were paid by the reinsurer to Senator in circumstances where it was intended (objectively) that Senator "…*should not have the free disposal of the money and that it should be applied solely for a specified purpose*" citing Snell's Equity (3rd ed.) para. 22-015.

218. The Defendants' submit that Equitas cannot rely upon s.21(1)(b) of the Limitation Act 1980 because Senator was not a trustee and the sums collected were not trust property. They contend that section 21(1)(b) is based upon the fiction that possession of trust property by a trustee is treated from the outset as that of the beneficiary such that a claim by a beneficiary is not time-barred because the beneficiary is treated as having had possession of the trust property throughout: *Halton International Inc. v. Guernroy Ltd* [2006] EWCA Civ 801 at [22]; *Williams* at [13]. Further, section 21(1)(b) protects a beneficiary's interest in the trust property but does not protect the right of a beneficiary to claim damages for breach of contract or ordinary breach of trust: see s. 21(3). The Defendants submit that actions within section 21(1)(b) are actions against "trustees". It

applies only to actions where the defendant was a trustee at the time of the breach complained of: *First Subsea Ltd v. Baltec Ltd* [2018] Ch 25 ("***First Subsea***") at [41]. While "*trustee*" is defined to include a "*constructive trustee*", the expression "*constructive trustee*" has been used to mean rather different things; it has been used to include persons with rather different obligations: *Williams* at [7]-[11] and [54]-[56]. It can include a de facto trustee: a person who intends to act as a trustee or a person who assumes the role of a trustee in relation to trust property (a trustee de son tort). It can also include a person who was not an express or de facto trustee but has the remedial obligations of a trustee thrust upon him by the courts of equity: a person who may have ancillary liabilities where no trust existed before the acts complained of but where, by reason of those acts, he is made liable in equity as though he were a trustee and his trusteeship arises only by reason of those acts. Section 21(1) applies only to the former; it does not apply to the latter: see *Williams* at [28] & [29] (per Lord Sumption JSC). A defining characteristic of the former is that *"(as with all trustees) they should be in lawful possession of trust property"*: *First Subsea* at [45].

219. The Defendants submit that section 21(1)(b) of the Limitation Act 1980 has no application to the facts of this case. They note that in *Walsham* reliance on s 21(1)(b) was abandoned: see *Walsham* at [33]. They made the following further points:

(1) Nowhere in the pleaded case is it alleged that there was a "trust" for the purposes of the section, that Equitas was beneficiary under a trust or that Senator was a "trustee", or more particularly was an express trustee or de facto trustee (an entity which had acted, through servants or agents, as though it was a trustee or had assumed fiduciary obligations in relation to trust property).
(2) All the proceeds of the reinsurance policies were amounts transmitted by insurers pursuant to their contractual obligations and not trust property. Those amounts were received by Senator pursuant to its contractual arrangements with Dermavale. If Senator then failed to remit amounts collected, the same would have occurred by reason of Senator having breached its contractual obligations, not as a result of breach of trust.
(3) Reliance on a "*fiduciary duty to account*" is misplaced. A duty to account is not a fiduciary duty: see *Coulthard Disco*. In some cases breach of a fiduciary duty may give rise to a constructive trust but a constructive trust is not sufficient for section 21(1)(b).
(4) Insofar as Equitas have referred to "trust property", the matters referred to do not constitute trust property. Equitas's "*claims to recover outstanding sums and damages where [Senator] owed a fiduciary duty*" (Reply paragraph 6.3) is not trust property. Similarly, insofar as Equitas have referred to "*the proceeds of trust property*", the matters referred to do not constitute the proceeds of trust property.
(5) It was never suggested to Mr Nugent that Senator had been a trustee of any monies received.

220. In response to Equitas's Post-Trial Note, the Defendants submitted that they do not dispute that the fact that Senator was not required to keep monies collected in a segregated account is not conclusive of there having been no '*Quistclose'* trust. However, they contend that the lack of such requirement is weighty evidence that Senator was not precluded from using the money collected other than for a specific purpose and that no '*Quistclose*' trust existed which in practice can only be countered by very weighty evidence the other way.

221. I turn now to consider whether the monies collected by Senator were subject to a trust in relation to which Senator was a trustee and the Syndicates/Equitas were beneficiaries and whether section 21(1)(b) of the Limitation Act 1980 applies in this case.

222. Equitas's pleaded case does not allege that there was a "trust" for the purposes of the section, that Equitas was the "beneficiary" under a trust or that Senator was a "trustee" (and, in particular, a *de facto* trustee). This argument was apparently raised for the first time at trial. However, the point was substantively advanced and responded to and accordingly, I will address it on its merits.

223. A trust may arise where one person, A, advances money to another, B, on the understanding that B is not to have the free disposal of the money and that it may only be applied for the purpose stated by A (see Snell's Equity (34th ed.) paragraph 25-033). A trust of this nature includes a '*Quistclose'* trust. In *Barclays Bank Ltd v. Quistclose* [1970] AC 567, the House of Lords held that where a sum of money was advanced for a specific purpose, the beneficial interest in the monies was retained by the payor until that purpose was achieved (see Lord Wilberforce at page 581G-H). Lord Wilberforce rejected the submission that where monies were advanced for a specific purpose and not used for that purpose, that the remedy should be an ordinary claim in debt:

> *"My Lords, I must say that I find this argument unattractive. Let us see what it involves. It means that the law does not permit an arrangement to be made by which one person agrees to advance money to another, on terms that the money is to be used exclusively to pay debts of the latter, and if, and so far as not so used, rather than becoming a general asset of the latter available to his creditors at large, is to be returned to the lender."*

224. That situation involved the retention of the beneficial interest by the lender or payor. The House of Lords further addressed the requirements of a '*Quistclose'* trust in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 ("***Twinsectra****"*). It was stated that:

(1) If the settlor of the trust enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them (at [71]);
(2) A '*Quistclose*' trust does not necessarily arise merely because money is paid for a particular purpose (at [73]);
(3) The question in every case is whether the parties intend the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 100 per Lord Mustill. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used *exclusively* for the stated purpose (at [74]).

225. In the classic '*Quistclose*' trust, the beneficial interest remains with the lender. The possibility of an express trust coming into existence as a consequence of a commercial transaction, where the beneficiary was the intended recipient of the money (i.e. the beneficiary of the 'purpose' of the trust) was considered by Michael Crystal QC (sitting as a Deputy High Court Judge) in *Re Margaretta Ltd* [2005] BCC 506 ("***Margaretta***"). The Deputy Judge set out the question at [13] as follows:

> *"The question whether an express trust arises in the context of a commercial transaction is essentially one of looking at the intention of the parties established by reference to all the circumstances*."

The Deputy Judge also stated that what is crucial "…*is not that the recipient be bound to apply the money for a specific purpose, but that he be precluded from misapplying it, i.e. from applying it other than for the specified purpose"*. At [24], he set out two situations where the intended *payee* under a Quistclose trust might obtain a beneficial interest in the fund, including situations:

(1) where the obvious intention of the transaction would be frustrated if the donor were to retain a power of revocation of the trust (*New, Prance & Garrard's Trustee v Hunting* [1897] 2 QB 19, CA) (*Margaretta* at [24(a)]); and
(2) where the existence of the trust arrangements is communicated to the intended payee and the latter gains a beneficial interest in the money either because of the creation of an estoppel in his favour or because communication perfects an assignment of the donor's equitable interest to him (*Acton v Woodgate* (1833) 2 My. & K. 492 at p.495; *Ellis & Co v Cross* [1915] 2 K.B. 654, at p.659; *Browne v Cavendish* (1844) 1 Jon. & La T. 606, at pp.635-36; *Morrell v Wootten* (1852) 16 Beav. 197 at pp. 202-203; *Re Hamilton* (1921) 124 L.T. 737) (*Margaretta* at [24(b)]).

226. In *Angove's Pty Ltd v. Bailey and another* [2016] 1 WLR 3179 ("***Angove***") at [19] Lord Sumption stated as follows:

> "19. *An agent has a duty to account to his principal for money received on his behalf. It is, however, well established that the duty does not necessarily give rise to a trust of the money in the agent's hands. That depends on the intentions of the parties derived from the contract, or in some cases from their conduct. As a broad generalisation, the relations between principal and agent must be such that the agent was not at liberty to treat as part of his general assets money for which he was accountable to his principal. This will usually, but not invariably, involve segregating it from his own money. The editors of Bowstead & Reynolds on Agency, 20th ed (2014), p 219, para 6-041, put the matter in this way:*
>
> > *'the present trend seems to be to approach the matter more functionally and to ask whether the trust relationship is appropriate to the commercial relationship in which the parties find themselves; whether it was appropriate that money or property should be, and whether it was, held separately, or whether it was contemplated that the agent should use the money, property or proceeds of the property as part of his normal cash flow in such a way that the relationship of debtor and creditor is more appropriate.'*

227. Here, if a '*Quistclose*' trust existed, the beneficial interest would, *prima facie*, remain with the payor i.e. the reinsurers from whom monies were collected by Senator, not the Syndicates. I have considered the two situations which the Deputy Judge in *Margaretta* at [24] identified might give rise to a beneficial interest in the intended payee. Neither would apply to give rise to a beneficial interest in this case. In relation to the first situation, it is not the case that the obvious intention of the transaction would be frustrated if the donor (the reinsurers) were to retain a power of revocation of the trust. The

reinsurers owe the debt to the Syndicates. If they were able to recover their monies, they could discharge that debt by payment to the Syndicates direct. Further, in relation to the second situation, there is no evidence that the existence of the alleged trust arrangements was communicated to the intended payees (the Syndicates). Further, there is no evidence of the creation of an estoppel in their favour or of any assignment of the reinsurers' equitable interest to those payees.

228. A relationship between a reinsured and reinsurer is contractual in nature, the reinsurer having agreed to indemnify the reinsured and becoming liable to indemnify when the reinsurance policy is 'triggered', for example by the happening of an event or the establishment of a liability. Proceeds of a policy are generally payable pursuant to the contractual obligation to indemnify. The proceeds of a policy are not trust property; when they are paid over by reinsurers they are not impressed with any trust in favour of the reinsured.

229. There was no requirement on Senator to segregate the funds received from reinsurers. It did not have an IBA. It in fact paid them into an unsegregated account. Some monies collected appear on the evidence to have been used to pay reinstatement premiums. Similarly, when the proceeds were received, the Biddencare Agreement did not impose any express trust on the proceeds, or make Dermavale or Senator a trustee. Senator was not obliged to segregate the proceeds from its own funds: *Angove's Pty Ltd* at [19]. I accept that the absence of a requirement to keep money separate is not necessarily fatal to a trust (*Cooper v PRG Powerhouse Limited (in liquidation)* [2008] BCC 588 ("***Cooper***") at [16]), but it is recognised to be an indicator that monies are impressed with a trust and the absence of such a requirement, if there are no other indicators of a trust, normally negates it (*R v Clowes (No 2)* [1994] 2 All ER 316 at p.325, cited in *Cooper* at [21]).There is no requirement to segregate monies contained in the Biddencare Agreement and it has not otherwise been demonstrated here to exist. Accordingly, that indicator, which would be a strong indicator of a trust, is absent here. I do not accept, absent any evidence from reinsurers, that those reinsurers who paid monies over to Senator would have assumed Senator was segregating them simply because it was the usual practice for Lloyd's brokers to do so. Even if there had been such evidence, I am not persuaded that the unilateral subjective intention of the payor would be sufficient to give rise to a trust and displace the default position that the transfer of legal title ordinarily carries with it the beneficial interest (Snell's Equity, 34th ed at paragraph 24-034).

230. Senator was subject to a contractual (and probably also a tortious and a fiduciary obligation) to Biddencare and Dewey Warren to apply the monies in settlement of the Insurance Debt to the related Insurance Creditor. Senator was not entitled to do what it wished with the monies collected, including keeping them. If it did not so apply the monies, it was in breach of those obligations which were personal in nature. However, the issue I am determining is whether the monies were impressed with a trust with the beneficial interest being that of the relevant Syndicates/Equitas such that it can be said that the monies were the Syndicates/Equitas's property, and subject to a proprietary tracing remedy. On the evidence before me, I am unable so to conclude. To the extent that it is arguable that another beneficial interest existed over the monies, such interest would appear to be that of the payor (the reinsurers), or possibly Dewey Warren to whom Dermavale/Senator had undertaken to apply the monies to discharge Dewey Warren's obligations to their clients. However, any beneficial interest was *not* that of the relevant Syndicates/Equitas in the circumstances of this case.

231. Senator was an agent of Dewey Warren and not an agent of the relevant Syndicates/Equitas and I have concluded that Senator did not owe fiduciary duties to the relevant Syndicates/Equitas. Accordingly, the existence of fiduciary duties does not provide a basis for inferring a trust over the monies collected by Senator. In any event, even where an agency exists and there is a duty to account to the agent's principal for money received on his behalf, it is well established that the duty does not necessarily give rise to a trust of the money in the agent's hands. That depends on the intentions of the parties derived from the contract, or in some cases from their conduct (see *Angove* at [19]). Accordingly, even if there had been a duty to account by Senator to the Syndicates, this in and of itself would not provide any basis on which it can be concluded that Senator was engaged in fiduciary dealings with trust property.

232. Having concluded that the monies collected by Senator were not impressed with a trust in favour of the relevant Syndicates/Equitas, section 21(1)(a) Limitation Act 1980 does not avail Equitas.

233. The causes of action pleaded by Equitas against the Defendants are therefore all statute-barred. The defence of laches (which was in any event not fully argued) does not appear to arise for determination in light of my conclusions above.

(4) Remedies

234. For the reasons set out above, I have concluded that Equitas has not established it has a valid cause of action against Senator and/or the remaining Defendants and that, even if it did, its claim is statute-barred. Accordingly, the issue of remedies does not arise. However, I would note, for completeness, that in relation to the claim for investment income, it was accepted by Equitas at trial that in relation to any claim for investment income, as assignee, it could not be in a better position than the Syndicates and in accordance with *Walsham* at [102 -133] was limited on sums not paid over to LIBOR plus 1% compounded with appropriate rests.