JUDGMENT : THE HON. MR JUSTICE ANDREW SMITH: Commercial Court. 27th April 2007

The proceedings

1. The main question that I have to decide is who should pay the costs of these proceedings, which have proved to be largely fruitless but which the claimants say they were justified in bringing and pursuing. There is also a claim for relatively small sums of money that the defendants are said to have received and be holding as agents.

2. The first claimants, Equitas Limited ("Equitas"), are the assignee of the rights of most of the members of Lloyd's syndicates for the years 1992 and earlier years in respect of their contracts of reinsurance and retrocessions for all their non-life business, having been assigned those rights in September 1996 as part of the settlement of much of the Lloyd's litigation. The second claimants, Additional Underwriters Agencies (No 9) Limited ("AUA") were joined in the proceedings to represent Lloyd's Names who did not accept the settlement offer made in 1996. AUA took no active part on these proceedings and I need not make further reference to them. The defendants, Horace Holman & Company Limited ("Horace Holman"), are a Lloyd's broker, who have been in run off since about 27 January 2003. The claim arises from outwards contracts of reinsurance or retrocession which were written to protect Lloyd's Syndicates for 1992 and earlier years and which Horace Holman were administrating.

3. These proceedings were brought on 17 October 2002. Equitas sought damages for breach of contractual, tortious and fiduciary duties in that, it is alleged, Horace Holman had failed

   i) to deliver to Equitas *"hard copies of ledgers and other accounting documentation showing balances currently due from or to the Syndicates under the Outward Protections"* (as the reinsurance and retrocessions placed through Horace Holman to protect the 1992 and earlier business of the Syndicates were called); and

   ii) to provide to Equitas a detailed account of all funds currently held by Horace Holman that were due and payable to the Syndicates or to Equitas as the Syndicates' assignee under the Outwards Protections, including an account of when all such funds were first received by Horace Holman on behalf of the Syndicates or Equitas.

   As well as damages Equitas claimed an order for delivery up of "all documentation held by [Horace Holman] relating to the placement and subsequent administration of the Outwards Protections including hard copies of ledgers or other accounting documents showing balances currently due per reinsurer from or to the Syndicates under the Outward Protections"; and an account and payment of money found to be due on taking an account.

4. On 30 January 2003 Langley J made an order by consent whereby Equitas were to return to Horace Holman claims files that Horace Holman had passed to them, and Horace Holman were to provide to Equitas by 28 February 2003 a detailed account as sought in the claim, that is to say a detailed account of all funds currently held by Horace Holman that were due and payable to the Syndicates or to Equitas as the Syndicates' assignee under the Outwards Protections, including an account of when all such funds were first received by Horace Holman on behalf of the Syndicates or Equitas. In the meantime, the proceedings were stayed.

5. On 28 February 2003, Horace Holman provided what they say is an account served in accordance with the order and their obligations to Equitas. This document has been referred to as the "*composite account*" and I shall adopt this term. It stated that Horace Holman had conducted *"a thorough review of the claims files that were delivered to it by [Equitas]",* and on the basis of that review Horace Holman concluded that they were holding nothing by way of funds received from reinsurers that were due and payable to the Syndicates or the claimants. They called upon Equitas to provide "*particulars of any funds they suspect or believe were or are so held".*

6. On 7 March 2003 Horace Holman provided details of the review that they had carried out, stating that they had reviewed the claims files returned by Equitas, had identified *"every note relating to each claim … either from hard copy or from a LORS sheet"* (LORS being Lloyd's Outward Reinsurance System, a system for giving notice of payments to be made through Lloyd's Policy Signing Office), and had examined the files for any correspondence indicating that they had pressed for payments that had not been received. They then set out on a spreadsheet the notes relating to each claim and any amounts outstanding from reinsurers, and provided schedules showing amounts that were not collected from reinsurers.

7. After Equitas raised certain enquiries about this information that I shall explain later in this judgment, Horace agreed to pay to Equitas US$91,058.67 and £1,419.07. (The parties agreed to write off a negligible sum in Canadian dollars.) These sums were paid on or about 25 June 2003, and I shall call them the "June payments".

8. The proceedings remained stayed until 30 October 2003, and then Horace Holman served a Defence on 4 December 2003. They claimed, among other things, that all relevant accounting documentation *"showing current balances due to or from the Syndicate"* had been provided when they transferred their claims files to Equitas in November and that Equitas were not entitled to their "internal ledgers". They also relied upon the composite account and pleaded that Equitas were not entitled to an order for an account because they had already taken an account on 28 February 2003, which showed no sum was due to Equitas.

9. Thereafter, the proceedings made little progress. In broad terms, an impasse was reached because Equitas wished to test the composite account which Horace Holman had provided and Horace Holman responded that that was neither practicable nor justified. Equitas incurred legal and accounting fees in trying to resolve the position, and Horace Holman incurred legal fees.

10. Eventually a Case Management Conference was held before Christopher Clarke J on 31 March 2006. He ordered that the parties meet "*with a view to agreeing a sampling exercise which [Equitas] will carry out, and the assistance which [Horace Holman] will provide in this regard.*" A meeting was held pursuant to this order on 26 April 2006 but no agreement was reached.

11. The Case Management Conference was restored before Langley J on 21 July 2006. Equitas applied to amend their Particulars of Claim to seek damages in respect of the legal and accounting fees that they had incurred. They made it clear that they were not pursuing their claim for an account, not because they no longer claimed to be entitled to one but because they took the view that Horace Holman's records were such that it was not practical to seek a meaningful account. Horace Holman resisted the proposed amendment on the basis that the fees were incurred by way of costs in the action and therefore are not recoverable as damages. Mr Adam Tolley, who represented Horace Holman, was asked this question by Langley J: "Assume that there might be some argument as to whether something falls outside costs or inside costs, if you looked at the detail, so far as your clients are concerned, it is your case, and you are happy, for all those items to be dealt with by way of the court exercising its normal power in relation to the costs of proceedings?" Mr Tolley replied that Horace Holman were content for the expenses to be viewed as costs, provided only, if or in so far as Equitas did not recover the legal and accounting fees by way of costs, they would then seek to claim them as damages.

12. In those circumstances, Equitas did not press their application to amend their claim. They were no longer pursuing their claim for damages or their claims for an account and documentation. The remaining dispute between the parties was about a claim for some relatively small sums that Equitas said were held by Horace Holman and due to them ("the money claim") and about who was to pay the costs, that is to say the legal and accounting costs incurred in the action.

13. Langley J ordered that there should be a hearing about who should pay the costs and a trial of the money claim, and made directions for this purpose. Accordingly, the parties served pleadings about what order for costs should be made. In addition, Equitas served evidence from four witnesses of fact, Horace Holman served three witness statements, and both parties served reports from expert accountants.

14. The hearing took four days, and seven witnesses of fact were called and cross-examined. Equitas called (i) Mr. P J Murrin, a partner in Messrs Davis Arnold Cooper, Equitas's solicitors, (ii) Mr. S P Loughlane, a Reinsurance Manager in the firm of Castlewood (EU) Ltd. ("Castlewood"), (iii) Mr. D R S Lumsden, a consultant at Equitas and (iv) Mr. P N Howes, who is also a consultant with Equitas, having retired from full-time employment with Equitas as their Head of Insurance Operations in about July 2003. Horace Holman called (i) Mr. A M Powell, their managing director, (ii) Mr. D C Whittle, who has been employed by Horace Holman since 1992 and is their IBA Accounts Manager, and (iii) Mr. B A Lear, who is Horace Holman's company secretary and was their Group Financial Controller until 31 March 2006.

15. I consider that all these witnesses were honest and seeking to give truthful evidence. The differences between their accounts of the primary facts were not significant.

16. Both parties produced expert evidence from accountants. The claimant's expert was Mr. R Oakes of Mazars. Horace Holman served a report of Mr. Michael Butler of Moore Stephens. In view of their reports I invited the parties consider whether their oral evidence was required: it was agreed that it was not, and that their reports could stand as evidence in the case without the authors being cross-examined.

The Issues for Determination

17. Equitas ask for an order that Horace Holman should pay the costs, and specifically the costs incurred in seeking to establish the true state of the account between the parties and to understand Horace Holman's accounting records; and for an order on the money claim for payments of sums in total amounting to US$95,848.59, £3.018.56 and Can $508. Horace Holman ask for an order that Equitas should pay their costs of the proceedings, and that the money claim be dismissed. Neither party argues that costs should be paid on other than the standard basis. The parties do not ask that I make any determination as to the costs incurred were reasonable or proportionate, although I observed during the hearing that this might well mean that issues covered in the witness statements before me will need to be considered by a costs judge upon an assessment. The parties expressed optimism that (despite the unhappy history of this dispute) this would be avoided.

18. The litigation has proved to be time-consuming and expensive. The correspondence, pleadings and witness statements, particularly those of Horace Holman, are prolix and unhelpfully argumentative. I shall refer later in my judgment to the parties' attitude to seeking to resolve their differences by some form of alternative dispute resolution ("ADR"), but it need hardly be said that it is regrettable that the parties have spent so much to achieve so little.

Horace Holman's records

19. In order to explain the nature of the dispute between the parties and how it arose, I should say something about Horace Holman's accounting systems, in particular about how they recorded (i) moneys that they held when they broked claims and received payments on behalf of their principals, including the syndicates and Equitas, and (ii) payments that they made to their principals.

20. Horace Holman maintained their records in relation to claims-handling on manual claims files. These, Horace Holman maintain, recorded all the information necessary to process claims on behalf of re-insureds and to identify any sums received from re-insurers and due for payment to the re-insureds.

21. It is agreed between Mr. Oakes and Mr. Butler that a Lloyd's broker's standard accounting system normally includes and should include (i) Insurance Broking Accounts ("IBA") ledgers, recording the transactions and balances arising from the insurance business, including debit and credit entries on the underwriters' ledgers and the clients' ledgers; (ii) IBA cashbooks, recording the receipts and payments of cash; and (iii) a nominal ledger recording the non-insurance transactions and balances and the controls accounts over the cashbooks and the insurance ledgers. It is also common ground that brokers would normally have a double-entry book-keeping system.

22. Horace Holman's accounting records were not so maintained. Their IBA accounting records were not reconciled with the claims files, and it was not practicable so to reconcile them. Nor did the accounts provide a balance of sums owing to Horace Holman's principals. Mr. Butler, Horace Holman's expert witness, said that *"the systems of control and reconciliations supporting the IBA ledgers were limited so that the IBA ledger accounts could not be relied upon in isolation"*. It was also his opinion that *"the inability to reconcile accounting information on the claims files cover sheets to the IBA ledgers made the systems adopted by Horace Holman vulnerable to error and cast doubt upon the completeness and accuracy of information on the claims files"*. Horace Holman's solicitors, Messrs Farrer and Co., stated in a letter dated 11 May 2004 that *"the IBA ledgers exist, but without a mammoth reconstruction exercise they are meaningless…"* .

23. It emerged only during the hearing before me that Horace Holman had other records which are not part of the claims files and are not part of their IBA accounting system. These comprise cash advice forms ("CAF's") and associated remittance advices (some of which were referred to as "tabs"). I shall refer to these later in my judgment.

24. Horace Holman are able to put forward a number of points in reply to criticisms of their accounting systems. They had attempted in the 1990's to introduce a computerised system, but that had been unsuccessful through no fault of Horace Holman's. Moreover, as Horace Holman point out, their accounts were audited each year without qualification and Lloyd's, as their regulator, never questioned their method of record keeping or agency accounting. They were not obliged to maintain their records in any particular form. They have broked a great deal of business relating to personal stop loss insurance policies and estate protection plan policies, and their systems have brought no complaints about their management of that business. Further, Equitas do not question their management of claims files that have been closed, and Horace Holman say that, for all the investigation carried out by Equitas, their systems have not been shown to have led to them failing to pay significant sums to Equitas or other errors.

25. Thus, Horace Holman argue that criticisms of their accounting systems made by Equitas are unfair and exaggerated. I accept that there is some force in these observations, but it does not seem to me that they go directly to the issues that I have to decide. Certainly they do not excuse Horace Holman from fulfilling the duties that they owe to Equitas as their principals.

Horace Holman's duties

26. There is no dispute that Horace Homan acted as the brokers and agents of Lloyd's syndicates and to Equitas as assignees of the rights of members of the syndicates for 1992 and earlier years. They admit that they owed the syndicates a duty to take reasonable care to maintain proper and adequate records which would allow the syndicates at any stage to ascertain the true state of the account with them and to ascertain what sums were owed to the syndicates and Equitas by their reinsurers. They also admit that they owed the syndicates a duty to "preserve and be constantly ready with correct accounts of all its dealings and transactions on behalf of each … Syndicate".

27. Horace Holman are clearly right to make these admissions: see Bowstead & Reynolds on Agency (17th Ed) para 6-88. Along with the duty to account in this way, Horace Holman are also under a duty to provide to Equitas their records, or copies of their records, in so far as they relate to transactions done as the agent of Equitas or the members of syndicates who assigned their rights to Equitas. If, as they apparently do, Horace Holman keep their records so that those relating to Equitas are inextricable from records relating to other principals, that does not excuse Horace Holman from providing Equitas with copies of the records relating to their affairs when Equitas call for them. *"It is for them to provide find some means of extracting what is relevant from the mass of their material. If such means cannot be devised with sufficient expedition, the [principal] will have to see the irrelevant material in so far as it is inseparable from the relevant"*: ***Yasuda Ltd v Orion Underwriting Ltd,*** [1995] QB at 174 p.191F per Colman J.

28. Horace Holman argued, citing ***Chandrey Martin v Martin,*** [1953] 2 QB 286, that they are not obliged to disclose or provide copies of documents created for their own purpose including their IBA ledgers, cash books and nominal ledgers. I cannot accept this. Horace Holman are obliged to provide copies of such documents in so far as they record transactions that Horace Holman carried out as the agent of Equitas or the syndicates whose rights were transferred to Equitas. ***Chandrey Martin*** is about the position between professionals and their clients. not the position between principals and agents: loc cit at p.293A.

Before the Proceedings

29. In October 2000 Horace Homan wrongly debited Equitas the sum of US$601,880.22 through an oversight which was later detected by Horace Holman's accounts department. Following a meeting on 25 April 2001 between Mr Deardon of Horace Holman and representatives of Equitas, on 27 May 2001 Horace Holman repaid Equitas

US$496,551.18 (having deducted reinstatement premiums owing by Equitas from the amount of the erroneous debit).

30. Equitas' note of the meeting records Mr Deardon as saying that he was sure that Equitas had other monies on their books that needed to be paid over. For their part, Horace Holman say (and I accept) that at that meeting Ms Mohoney of Equitas spoke of £2 million being held by Horace Holman for Equitas. The next day she sent a compliments slip on which she wrote, "*Please note the amount should be c. £20m + and not c£2m as I said at our meeting*". According to Mr Murrin, although Equitas' internal accounting system (referred to as MAX) indicated that £20 million was due from Horace Holman, Equitas recognised that they could not rely upon their systems to claim this amount from Horace Holman: in particular, this included stop loss cover that Horace Holman had ceased to handle before Equitas' incorporation and Equitas' accounting system did not differentiate what was unpaid by reinsurers and what reinsurers had paid to brokers. (I observe in passing that it does appear that Equitas' accounting records were unreliable and unsatisfactory, but Equitas owed Horace Holman no duty as to how their records were kept. This does not affect the question about costs that I have to decide.)

31. At the meeting on 25 April 2001 the parties also discussed a proposal that Horace Holman transfer to Equitas the handling of claims. Equitas presented to Horace Holman their standard form of "broker transfer" agreement, which would have required Horace Holman to transfer to Equitas hard copies of their ledgers and accounting information. On 13 June 2001 Mr Deardon asked Ms Mahoney whether Equitas would contribute £10,000 to enable Horace Holman to "cleanse" their files. Ms Mahoney asked him to explain the request in writing but Horace Holman did not pursue the matter. Mr Deardon left Horace Holman at about this time.

32. In the event, Horace Holman declined to enter into Equitas' standard broker transfer agreement. Equitas learned of this on 6 August 2001; they were told that Horace Holman had difficulties in servicing the account because they were short of staff, but this also meant that they were unable to transfer the responsibilities to Equitas. Their concern was that they would have had to undertake the task of reconciling the past balances on their IBA account.

33. On 11 September 2001 Equitas formally requested that Horace Holman transfer to them specified documents including *"live claims files"* (that is to say, open claims files) and "hard copies of the ledgers relating to the Reinsurance Agreements and accounting information showing current balances due per reinsurer for each of the Reinsurance Agreements". They threatened legal proceedings if the files were not transferred within 30 days.

34. Horace Holman responded on 11 October 2001 that files were being prepared for transfer, and stating that particular files had already been transferred. With regard to the ledgers, however, Horace Holman explained that their *"systems are unable to separate specific items relating to 1992 and prior year syndicates",* and that *"it is almost impossible to separately identify ledger entries relating to the contracts identified in your letter unless specific transactions are referred to"*. On 17 October 2001 Equitas issued a Market Bulletin stating that they had reached an agreement with Horace Holman for the transfer of files and records relating to the re-insurance. In the event, Horace Holman transferred their live claims files to Equitas in the middle of November 2001. No broker transfer agreement had been signed, and when Equitas asked to undertake an audit of Horace Holman's accounts ledgers, Horace Holman, in a letter dated 18 March 2002, again declined to enter into a broker transfer agreement and stated that they were unable *"to separate items from our ledgers relating to the reinsurance business concerned"*.

35. Equitas, however, continued to press Horace Holman to enter into a broker transfer agreement in a letter dated 4 April 2002. In the same letter they required the delivery up of Horace Holman's ledgers relating to Lloyd's reinsurance business for 1992 and prior years, and also gave formal notice that Horace Holman should provide within seven days *"a detailed account of all funds held by Horace Holman …which are due and payable to any 1992 or prior year Lloyd's Syndicate and/or Equitas Limited" and an account of when Horace Holman received such funds. On 11 April 2002 Equitas' solicitors, Messrs Davies Arnold Cooper ("DAC"), wrote to Horace Holman in similar terms, and threatened legal proceedings. By letter dated 12 April 2002, Horace Holman asked that the matter might await the return from holiday of their compliance officer in ten days time, but DAC replied that their instructions were not to await his return but that they were "continuing preparations for the issuance of proceedings"*. I agree with Horace Holman that this response seems unnecessarily aggressive. DAC wrote further on 20 June 2002 saying that they were preparing proceedings, but that if Horace Holman provided the information requested in their letter of 11 April 2002, they would *"have to consider with [Equitas] whether those proceedings would be necessary"*. In fact proceedings were not issued for some four months after that. I was told that this was because it took "a considerable period of time" to receive counsel's response to instructions.

36. In correspondence between April and October 2002, the parties maintained their positions. In a letter dated 30 August 2002, Horace Holman stated that the information in the claims files *"substantially meets your demands", and that "With respect to those claims files, each one contained full backup documentation of individual transaction notes and accounts entries to receipt of monies, onward payment to Equitas, and any residual amounts which remain uncollected .. we would contend that we have already complied with the requirement for hard ledger paperwork"*. Equitas maintained that the information on the claims files did not meet their requirements, DAC stating in a letter dated 9 October 2002 that *"it does not provide a consolidated ledger by reinsurer and requires us to recreate a proper underwriting/client ledger which it is incumbent on the broker to maintain"*.

The exchanges after the proceedings were brought

37. As I have said, the proceedings were eventually brought on 17 October 2002. Horace continued to assert before and after they were brought that no sums were owing to Equitas. Specifically they did so in their, or their solicitors', letters dated 30 August 2002, 17 October 2002 and 6 November 2002. In the last, Messrs Farrer & Co wrote that Horace Holman kept any information relating to a claim on their claims files, and that *"In order to verify whether all claims made by the Syndicates have been properly processed and all amounts collected from reinsurers accounted for … your clients need only examine and reconcile the Syndicates' claims records with [Horace Holman's] claims files"*. They also said that Horace Holman's ledgers were not designed to account by year of account, and "*Splitting out 1992 and prior items from the ledgers is therefore not feasible and identifying such items within the total ledgers would be at best haphazard"*. Equitas complain that the suggestion that they could check that all sums had been handed over by Horace Holman does not take account of the fact that Equitas would not know what sums had been collected by them, and in particular had no way of checking whether all receipts had been appropriately recorded on a claims file.

38. Particulars of the claims were served on 28 November 2002 and the parties agreed that service of a defence could be postponed pending production of an account by Horace Holman. Farrer & Co had by letter dated 6 November 2002 stated that Horace Holman *"would be prepared to take back all the claims files that they handed over to [Equitas] in Autumn 2001 and then produce to [Equitas] an account of 'all funds that are due and payable to any 1992 and prior Lloyd's syndicate year of account and/or Equitas, including dates from which such sums have been held'"*. By letter dated 11 December 2002 DAC agreed to this course, but stated that, *"The account which [Equitas] seek would allow the recipient to track the trail of monies from receipt in Underwriting account, transfer to Syndicate Client account and ultimate payment to [Equitas]"*. (On 10 December 2002 Farrer & Co sought particulars of the claim, requesting *"the best particulars … in relation to any sums that [Equitas] allege [Horace Holman] has failed to hand over to them" and "the basis for each allegation"*. Given the previous correspondence and the nature of the claim, it is unsurprising that Equitas did not provide them.)

39. Accordingly, the consent order to which I have referred was made on 30 January 2003. Horace Holman served the composite account on 28 February 2003. In it Horace Holman stated that *"As at 28 November 2002… it was holding £0.00 in respect of sums received from re-insurers which were due and payable to the Syndicates and/or to Equitas as assignee under the outward protections and/or AUA… the position remains the same as at today's date"*. They went on to explain that they *"relied solely upon the information contained in the relevant live claim files"*, and that they *"did not rely upon any other source of information (including, for the avoidance of doubt, the IBA ledgers …)"*. The document did not set out details of what sums had been collected and when and whether they had been paid to Equitas, but Horace Holman contend that the information that they did provide complied with the order of 30 January 2003 and fulfilled their duty to account to Equitas.

40. In a document entitled "Detailed Particulars of the Review Process" served on 7 March 2003, Horace Holman set out in more detail how they had produced the composite account, and they served with the Detailed Particulars a document listing uncollected balances.

41. The work that Horace Holman did to produce the composite account was carried out by Mr Desmond Whittle. He explained in his evidence that in order to do the work Horace Holman recovered all the claims files from Equitas, together with six of Equitas' own files, and he examined each of them. When he first undertook this exercise, Mr Whittle was instructed to leave aside the contracts which were covered by the files which Equitas had supplied. However, after he thought that he had completed the task, he was told to include these items, and he did so. This meant him completing his task in some haste. Indeed, Mr Whittle worked throughout under considerable pressure to produce the composite account within the time constraints that Horace Holman had agreed.

42. Mr Whittle started his examination of a claim with the summary cover sheet, or control sheet, which was opened by Horace Holman whenever a claim was made and which contained basic information, including the reinsurance market and the value of the claim. The control sheet also recorded when the file was broked to the market for a claim to be accepted by the reinsurers, and showed the amount of any claim, and what had been paid by the reinsurers. It was also possible to tell from it whether a reinsurer was unable to meet the claim (for example because of insolvency) or if a claim had been commuted by Equitas' agreement to accept a reduced payment in settlement; and it showed if a payment had been made through the "pip-out" system, a system introduced by Equitas in 1999 whereby claims were settled internally when both the reinsured and reinsurer were syndicates. If the position on a claim was not clear from the control sheet, Mr Whittle said that he ascertained it by examination of the claims files, which included records of what payments had been by Horace Holman to Equitas. The claims files also contained credit and debit notes raised in respect of the claims, showing sums received and sums paid by Horace Holman.

43. Thus, the composite account depended upon the claims files being accurate and complete. When Horace Holman received payments (often by way of "block" payments covering several claims) from reinsurers through London Policy Signing Office ("LPSO") or LPC ("LPC", or London Processing Centre, being a database whereby London companies automatically pay the reinsured through their broker), they are accompanied by remittance advices (sometimes, particularly in the case of remittances from LPSO, referred to as "tabs"). Horace Holman recorded incoming payments on a CAF in their accounts department, and the CAF included information from the remittance advices or had attached to them the remittance advices themselves. The purpose was to identify the claim or claims to which the receipt related. The CAF's would then be circulated to the claims staff so that they could pick up any payment which was made in respect of a claim that they were broking. Each claims technician would initial

the CAF to confirm that he had seen it and checked whether it included a payment for a claim that he was managing. The CAF's were kept in a lever arch file in the claims department.

44. Mr Whittle acknowledged that, in the case of bureau accounts, it would not be uncommon for a lump payment to be received in respect of a number of syndicates, and it might not be possible immediately to allocate it a claim or claims and it would be posted to Horace Holman's IBA accounts and further details would then be sought about the claim or claims to which it related. He also acknowledged that if a claims technician did not have a file in his possession when a CAF was circulated to him, a payment relating to that claim might be placed as unallocated cash in the IBA ledger.

45. More generally, it will be apparent that the integrity of the system was dependent upon individual claims technicians recognising and allocating receipts to a claim that they were managing. If they failed to do so, that payment would never be recorded on the claims file. An account drawn by reference only to the claims files, as the composite account was, would not, as I understand it, reflect any payments which had been received by Horace Holman but not picked up by the claims technicians. This would have required reference to the CAF's or Horace Holman's IBA records or both.

46. Mr Whittle said that he had not, when preparing the composite account, traced payments from Horace Holman's cash book recording receipts to the claims files. Nor did he examine the CAF's. While it would have been possible to trace individual payments in this way, and indeed he said that it would not have been a difficult or time consuming process to do so if the reinsurer had not written a great deal of business, it would have been be a enormously laborious exercise to check all the payments made on all the claims files that were still open. When later Equitas raised questions about particular receipts which had not been reflected in the account that Mr Whittle drew up, Mr Whittle then traced and examined the relevant remittance advices relating to these specific files.

47. For this reason, Equitas complain that the composite account provided by Horace Holman was vulnerable to errors, particularly because a receipt might not be recorded on the appropriate claims file. I agree with this observation.

48. After Horace Holman had served the composite account, the action was stayed between 25 March 2003 and 31 October 2003 whilst the parties investigated and corresponded about the accounting position between them. Equitas questioned on two bases the conclusion of the composite account that nothing was due to them. On 12 March 2003 DAC wrote to Farrers about what has been called the "River Thames" exercise: I shall refer to this later. Equitas also carried out an examination of files that they had received and concluded that Horace Holman had failed to pay all sums due in respect of three contracts: it appeared to Equitas that Horace Holman collected but had failed to pay them £4,637.84 and US$218,893.20. This concern was raised with Horace Holman at a meeting on 17 March 2003, and later Equitas questioned the position under a fourth contract in relation to which, they said, Horace Holman had collected and failed to pay to Equitas £146.38 and US$53,443.40.

49. Horace Holman investigated the position on these contracts and, while the discrepancies were not as great as Equitas had thought, they discovered that they had indeed retained monies that were due to Equitas. On 10 April 2003, Mr. Lear of Horace Holman wrote to Equitas, stating, "… it would appear that part of the balances have indeed been collected but not paid across to Lloyds. These were not picked up during our review of the files because the items in question were not annotated to indicate that these amounts had been received. These examples, we believe, can be put down to human error. The only plausible reason that we can think of is that in these cases, claims staff were awaiting receipt of outstanding amounts before paying on to Lloyds/Equitas. … we have also become aware of certain shortcomings in the quality of some claims staff during the period from early 2000 to the beginning of 2002. Obviously the question arises as to how we establish whether there are any further examples … . In the meantime, holidays notwithstanding, we would consider whether there is any useful investigation work we can carry out for claims processed between January 2000 and December 2002, the period in which these examples fell."

50. In June 2003 Horace Holman paid to Equitas £1,419 and $US 91,058 in relation to the four contracts.

51. Horace Holman make two points in relation to this matter. First they say that these errors arose in part in respect of funds which were collected when Equitas held the relevant claims files and were administering claims under the contract. This was so for some of the sums collected, but not for all of them. It is impossible, in my judgment, to conclude from the evidence how many of the relevant payments were made when Equitas held the files, and it is not necessary to determine this. The fact remains that Equitas had found that the system operated by Horace Holman was not entirely reliable. When Equitas raised their concerns, Horace Holman found payments recorded in their cash books but not entered into their claims ledgers and so not reflected in the composite account.

52. This was acknowledged by Mr Lear's letter of 10 April 2003. However, Mr Lear's evidence was that when he wrote this letter, he was unaware about when claims files had been transferred to Equitas, and having learned the true position, he considers that his criticisms of Equitas' claims staff were not justified. However, in their letter of 15 December 2003 Farrer and Co. wrote that inevitably there would be "one off errors" of this kind, and this seems to me to be realistic in view of Horace Holman's accounting systems. This view is supported by the expert evidence of Mr Oakes and Mr Butler.

53. Horace Holman also argue that the errors occurred because Equitas withheld information from them. Mr Powell said that he believed that "Equitas' hope was that Horace Holman would trip up when preparing the Composite

Account, and that they would then use any inaccuracies in the Compsite Account as a justification for the litigation", describing their conduct as "underhand" . However, Equitas' concerns about these contracts were raised by Mr Delaney of Equitas in an e-mail of 14 March 2003, after the composite account was delivered. There was no reason that Mr Delaney should have examined these contracts before Equitas received the composite account. There is no proper basis for Mr Powell's allegations. They amount to speculation which is no proper basis for allegations of this kind, and I reject them. In any case they provide no explanation for Horace Holman's errors.

54. As I have said, on 12 March 2003 DAC wrote to Farrer & Co about the River Thames exercise, which also caused Equitas to be concerned that Horace Holman might be holding sums that were due to them. Equitas had carried out work to test the reliability of the information that they were being given that no monies were owing to them from Horace Holman (as they had been told before the composite account was provided). This has been called the "River Thames" exercise because it involved checking payments made by re-insurers called River Thames Insurance Company Ltd. and Regis Agencies Ltd. (together referred to as "River Thames") to whose records Equitas had access. A comparison was made between what River Thames' records showed them paying to Horace Holman through the LPC and what Equitas received from Horace Holman through the LPSO.

55. River Thames belonged to a group of companies called Castlewood (which included Castlewood (EU) Limited) and River Thames exercise was carried out by Castlewood and by Messrs Deloitte and Touche. Their work suggested a difference of $US616,790.42 between what was paid by River Thames and what was received by Equitas. This figure was first indicated in a report of Deloitte and Touche dated 16 January 2003, which specifically explained that they had carried out limited procedures and had not carried out an audit. Based upon those procedures they concluded that River Thames had paid at least US$634,972.02 to Horace Holman through the LPC and payments by Horace Holman to Equitas through the LPSO identifying River Thames amounted to US$18,181.60. On 12 March 2003 DAC wrote to Farrer and Co. enclosing a copy of the report of Deloitte & Touche, requesting Horace Holman's assistance about the apparent discrepancy and stating that it was only an example of the concerns of Equitas since River Thames "represents a small percentage of the total underwriting capacity available and broked by [Horace Holman] over the relevant years".

56. This matter was discussed at the meeting on 17 March 2003 to which I have referred and at a further meeting on 4 April 2003. Horace Holman explained at the meeting on 4 April 2003 that the calculation had not brought into account payments that LPSO had made to Equitas without providing sufficient details to enable the payment to be allocated to any particular re-insurer. Mr Whittle had examined the entries in LORS and had concluded that Horace Holman had paid over all the sums that they had collected. It was suggested that Castlewood should review the exercise using information from the LORS, which is maintained on the basis of individual transactions and so could identify payments made by way of block payments through LPSO.

57. Castlewood developed their work based on the River Thames records in what has been referred to as the "second River Thames exercise" or the "theoretical River Thames exercise". They calculated the total payment that would have been made by all reinsurers to contracts to which River Thames had subscribed on the basis that the reinsurance had been fully placed and claims had been fully paid. The assumption was that if River Thames made a payment, the other reinsurers would also have done so. This analysis, which was supplied to Horace Holman at a meeting on 7 May 2003, showed a preliminary discrepancy on 35 contracts to which River Thames had subscribed of about US$3.6 million. It was decided at the meeting that Horace Holman should initially focus their investigations into the position under three contracts which accounted for more than 80% of the apparent discrepancy.

58. This calculation of US$3.6 million, however, left out of account many considerations, including re-insurers who did not pay, for example through insolvency, or who were slow to pay; re-insurance placed with other Lloyd's syndicates where payments were made by "pip-outs"; cases where a partial re-insurance order had been placed; and payments reduced because they were made under commutation. The contract in respect of which the largest discrepancy, some US$1.6 million, was indicated came to be called "contract 1". When this was discrepancy was examined by Horace Holman, they reduced it to less than US$200,000. They also made preliminary adjustments that similarly reduced or eliminated the discrepancies in respect of "contract 2" and "contract 3". These were explained to Castlewood at a meeting on 13 June 2003.

59. In a letter dated 21 August 2003 (which was sent "*without prejudice*" but in which privilege has been waived) Equitas estimated that there was "a minimum cash shortfall of US$350,476 in respect of those contracts the River Thames participated in before the RTI communications with Equitas". This sum was estimated by calculating in respect of contract 1 a "shortfall" (difference between what had been paid to Horace Holman and what had been paid by them) of US$181,762 (of which Equitas said, "*The only way this discrepancy can be explained is that it must still be in the brokers account*), by calculating that what was paid to Equitas in respect of contract 1 represented 55% of what was paid in respect of all River Thames contracts and by assuming that there was the same proportionate "shortfall" in respect of other contracts as there was in respect of contract 1. Equitas said that they were willing to accept US$300,000 in settlement of the estimated shortfall on the River Thames contracts, and they also invited Horace Holman to propose a payment for settlement of the rest of the account. Horace Holman did not consider this a proper way to calculate the total shortfall.

60. Exchanges between the parties continued, but the parties were unable to resolve their differences. The details of these exchanges do not, in my judgment, affect the matters that I have to decide. It suffices to record that on 15 December 2003 Farrer & Co reiterated criticisms of the River Thames exercise and suggested that the way

forward was for Equitas to produce a *"full and accurate account of all balances due on the basis of Equitas' own records"* and said that Horace Holman could investigate and resolve them. In reply, on 5 February 2004 DAC sent Farrer & Co an opinion of Mr. Colin Edelman QC (in which they waived privilege). Mr Edelman considered the methodology adopted by Castlewood in the theoretical River Thames exercise and expressed the opinion that *"the existence of a material discrepancy between the appropriately grossed up LPC value and the LORS value ought to be sufficient to cast the burden onto the broker to explain the discrepancy"*. By their letter of 5 February 2004 DAC also stated that Equitas had made adjustments to the calculated balance due on "contract 1", which reduced it to US$117,452, £3,322 and Can $508.

61. On 26 February 2004, in preparation for a meeting to be held on 27 February 2004, Farrer & Co responded to the letter of 5 February 2004. They enclosed with the letter schedules setting out their calculation that the difference between payments to Horace Holman and payments by Horace Holman in respect of ten contracts examined in the theoretical River Thames exercise was approximately US$30,000. They made it clear that this was the discrepancy indicated "on a preliminary basis". They argued that Equitas had *"no reasonable reliable evidence of the retention by [Horace Holman] of monies due to Equitas", and that Equitas had "no tenable alternative to withdrawing their claim"*. Horace Holman's figures included these, which are reflected in the money claim pursued by Equitas: in respect of "contract 1", differences of US$18,652.42 and £1,202.20; in respect of "contract 3", a difference of US$5,512,37; in respect of "contract 5", differences of US$8,014.70 and £1,816.37; and in respect of "contract 6", a difference of US$2,434.52. I note that other balances in the schedules indicated overpayment by Horace Holman.

62. At a CMC on 5 March 2004, the parties were ordered to make standard disclosure. When they served their list of documents, Horace Holman made it clear in their disclosure statement that they had not searched for disclosable entries in their IBA ledgers. Equitas issued an application for specific disclosure, but in a letter dated 11 May 2004 Farrer & Co declined to make further discourse, writing that "Information in [Horace Holman's] ledger is abstract and incomplete" and that its disclosure would result in "countless queries" and be disproportionate. They wrote, "… were one to attempt to search the IBA ledgers by reference to a particular claim, there is a strong likelihood that there would be no entry whatsoever in relation to receipts and payments out before mid-2002. Similarly, were one to attempt to use the system to track the destiny of a particular receipt, in many cases, the only identifying tags would be the amount and date of receipt. Given that many, if not most receipts were composite or partial, and occasionally included brokerage, or related to claims which had been commuted, the figure would rarely be of any assistance and would, indeed, be misleading. In contrast, you will appreciate that the claims files, which record every necessary detail, are the most reliable and complete source of accounting information and it is absolutely reasonable for [Horace Holman] to rely on them."

63. On 14 May 2004 Farrer & Co for their part issued an application for specific disclosure of Equitas' own accounting documents. In the event, the parties agreed to postpone the listing of both applications for specific disclosure. DAC suggested that instead Horace Holman allow Equitas facilities to inspect their ledgers and statements, and by letter dated 11 June 2004 Farrer & Co wrote that Horace Holman would allow Mr Oakes of the accountants Mazars to inspect their IBA ledgers and bank statements on behalf of Equitas "solely for the purpose of the question of the extent (if any) to which those ledgers and bank statements would assist in determining whether [Horace Holman] is holding funds received from insurers which are due and payable to the Syndicates and Equitas, but which have not been paid".

64. Between the end of 2004 and the summer of 2005 Mazars investigated Horace Holman's records. They concluded that, as Equitas had been told, the IBA ledger and associated documentation were of no practical value for investigating whether sums were due from Horace Holman to Equitas because it was difficult to identify specific transactions in them. The applications for specific discovery were withdrawn.

65. On 3 November 2005 Equitas made an offer under part 36 of the RSC whereby they offered settlement of their claim by payment by Horace Holman of US$80,000 together with their costs. The offer was rejected in a letter dated 3 February 2006, and subsequent correspondence between the parties did not narrow the differences between them.

66. On 26 March 2006 Equitas made a further offer to resolve the litigation on the basis that neither party sought its costs, that offer being open for acceptance until 29 March 2006. The offer lapsed and on 30 March 2006 Farrer & Co wrote that Horace Holman were not prepared to settle on the basis that each party paid its own costs and required "*a substantial payment … in respect of its costs and in settlement of the disputes …*".

67. After the order of Christopher Clarke J on 31 March 2006, Equitas attempted to devise a sampling exercise to test the reliability of information from Horace Holman. They concluded that this was impossible because of Horace Holman's inadequate accounting records, and in particular because they relied upon manual claims records to show the accounting position with their principals, and, in Equitas' view, this system of record keeping was inherently unreliable.

Mediation

68. Despite all investigation and correspondence between the parties before and since the start of this litigation, it became apparent soon after the hearing started that Equitas had not understood quite what records Horace Holman have. They were unaware that, apart from the IBA records and their claims files, Horace Holman have records by way of CAF's and remittance advices, and that these might be used to trace entries in the claims files

to the IBA ledgers. Indeed, after learning about them, at one stage of his final submissions Mr N Calver QC, who represents Equitas, said that Equitas resiled from the position that they had adopted before Langley J and throughout the hearing before me and asked that an account be taken. This change of stance took Horace Holman by surprise and it opened the prospect of costs of this litigation continuing to haemorrhage. On reflection Equitas reverted to their position that they do not seek an account, but this history indicates a degree of misunderstanding between the parties to this expensive litigation. The way that the trial proceeded confirmed my view that it is regrettable that there has been no proper attempt to resolve this dispute through mediation or some other form of ADR. Indeed, Mr Calver rightly observed at the start of the trial that this case ought to have been settled through mediation or negotiation.

69. The parties completed case management information sheets before the CMC's held on 5 March 2004, 7 April 2006 and 21 July 2006 and on each occasion their solicitors answered the standard questions about ADR. In all three of their case management sheets Equitas stated that ADR had been explored but Farrer & Co had *"indicated on 27 February 2004 that they did not have instructions on this issue"*. (This was a reference to the meeting between solicitors to which I have referred.) In each of their case management sheets completed by Farrer & Co Horace Holman stated that DAC "indicated on 27 February 2004 that the use of ADR at this stage is unlikely to assist, which is confirmed in the Claimants' Case Management Information Sheet. This is consistent with the Defendant's position.", and they responded "it appears unlikely at this stage" to the question whether some form of ADR might assist to resolve or narrow the issues. The responses to the same question given by DAC were somewhat more encouraging but it was only in the last sheet of July 2006 that they answered unequivocally that it might assist.

70. According to the unchallenged evidence of Mr Powell, which I accept, at the meeting between solicitors on 27 February 2004 DAC raised "as a formality" the issue of mediation but said that Equitas considered that it would be unlikely to assist. Mr Powell said that he agreed that it was unlikely to assist.

71. At the hearing on 21 July 2006 the parties stated their position with regard to ADR. Equitas said that they encouraged Horace Holman to consider mediation, but Horace Holman said that because of Equitas' past conduct, they did not think that they would be able "to do business" with Equitas. In view of this response, Equitas took the view, and Langley J agreed, that there was there was not much point in an order for ADR.

72. It seems clear to me from both the form and the content of the repetitive answers in the case management sheets that no serious consideration was given to mediation or ADR by either party until Equitas adopted a more positive position in July 2006.

The money claims

73. Equitas' money claim is based upon the theoretical River Thames exercise: they claim sums are due in respect of "contract 1", "contract 3", "contract 5" and "contract 6". The issues in relation to the money claim are (i) whether the sums claimed were paid to Horace Holman, and (ii) in respect of some of the monies claimed in respect of contract 1, whether, if they were received by Horace Holman, Horace Holman have made corresponding payment to Equitas.

74. The evidence about both these issues is far from complete, and both parties have made submissions about where the burden of proof lies. In my judgment it is for Equitas to show what sums were received by Horace Holman, and if they do so, it is for Horace Holman to show that they have paid them over to Equitas. This seems to me the proper application of the general principle that he who asserts a proposition must prove it: ***Joseph Constantine Steamship Line Ltd. v Imperial Smelting Corp Ltd.,*** [1942] AC 154 at p.174 per Visc Maugham. However, since my decision about the money claims does not depend upon where the burden of proof lies, I need not consider this further.

75. I have concluded that the theoretical River Thames exercise does prove to the requisite standard that (subject to uncertainty about the claim in Canadian dollars to which I shall refer) generally the monies claimed by Equitas were received by Horace Holman. The basic methodology of the exercise seems to be sound provided that proper adjustments are made. It is true that major adjustments were properly made to the calculations initially put forward by Equitas, and it is impossible to be certain whether there might be an explanation for part or all the remaining unexplained differences on these contracts that is consistent with Horace Holman not having received these monies. However, no such explanation has been suggested and on the evidence before me, I conclude that Horace Holman did receive the sums in US dollars and sterling that Equitas claim.

76. Equitas also have a claim for Can $508. This sum is not referred to, I think, in the letter of Farrer & Co of 26 February 2004 upon which Mr Calver relied. If this claim is pursued by Equitas, I shall invite brief submissions about it when I hand down this judgment.

77. Horace Holman submit that they paid to Equitas US$61,234.96 that is to be brought into account against the money claim. In support of this submission they rely upon the fact that the LORS database contains comments entered by Horace Holman as a note relating to a later (undisputed) payment that two sums of US$60,937.45 and US$297.51 had been "previously paid" to Equitas. (It is to be noted that the database also records as "previously paid" sums of -£604.97 and £67.97.) These comments about sums being "previously paid" were entered when the later payments were being processed.

78. Equitas dispute that these entries refer to payments that were in fact made. It is certainly the case that, while the LORS database records that these payments *had* been made, there is no record of the payments themselves. They

are not recorded in Equitas' accounting system (which was referred to as MAX), but, as Equitas rightly accept, these records are unreliable and incomplete. As for the records of Horace Holman, Mr Whittle told me, and I accept, that the control note is missing from the relevant claims file (and this is the only file where the control note is missing). Otherwise this file contained all the usual documentation but nothing relating to the supposed "previous" payments. However, the fact that there is no control note means that the claims file is incomplete, and therefore the absence of documents relating to these payments is the less significant.

79. Equitas' strongest argument that these payments were never made, as it seems to me, is that they have not been able to trace any record of them by searching in the LORS database. Mr Lumsden told me, and I accept, that Equitas have made every attempt to find some record of them in the database, not only by searching by reference to the payment code (which might have been entered erroneously) but by other reference tools such as by date and by contract. However, I have no satisfactory evidence about how certain it is that a payment would be traced in this way.

80. Equitas also point out that the notes about previous payments are against payments which were given the reference "Pepper 11" (Pepper being the name of the underwriter involved). There are no payments recorded under the reference "Pepper 10", which would, of course, be the preceding reference. Mr Whittle confirmed that it is unusual for a payment to be missing from a sequence. I am unable to see how this provides additional support for Equitas' contentions. Their argument is based upon the fact that no record of the payments has been found in the LORS database: the fact that no payment under the reference "Pepper 10" is, of course, consistent with this, but is not of independent significance.

81. Against Equitas' arguments, there remains the simple fact that the LORS database does record that these payments were "previously paid". The entries were not "self-generating" or computer generated: they reflect a manual entry by a clerk – either the entries were made by a clerk at Horace Holman and the information was transmitted electronically to LORS or they were made by a clerk at LORS who had been supplied with the information by the brokers. Either the entries were erroneous, as Equitas maintain, or the entries represent payments that had previously been made but have not been traced, possibly in part because they were miscoded.

82. Mr Whittle gave evidence that he had found other payments where there had been notes of previous payments in the LORS records, but on the face of it there was no corresponding entry in the payments column. He had found cases where the original payments had been made and recorded but miscoded (the number "0" being entered as the letter "O").

83. The sums which are recorded as having been "previously paid" are exact sums: they cannot have been a figment of the clerk's imagination, and it has not been suggested that a clerk would deliberately have made a false entry in the database. It is possible that the clerk erroneously entered as a previous payment against this contract a sum which had not been so paid: it is possible, for example, that the clerk mistakenly recorded a payment made against another contract or mistakenly recorded sums which should have been paid but were not. However, there is no evidence to support such theories. It seems to me more likely that the clerk was recording payments which had been made – and which might well have been recorded on the missing control sheets. Although the evidence is somewhat exiguous, I conclude that Horace Holman did pay these sums to Equitas.

84. My conclusion with regard to the money claims, therefore, is that Equitas are entitled to payments of US$34,614.01 (being US$18,652.42 in respect of "contract 1", US$5,512.37 in respect of "contract 3", US$8,014.70 in respect of "contract 5" and US$ 2,434.52 in respect of "contract 6") and £3,018.57 (being £1,202.20 in respect of "contract 1" and £1,8216.37 in respect of "contract 5").

85. I should refer briefly to a further argument advanced by Mr Calver. Horace Holman acknowledge that the sums claimed represent an "unexplained difference" resulting from attempts to reconcile figures in the books, and Equitas submit that in these circumstances because Horace Holman failed to keep adequate accounts of their dealings as agent for the Syndicates and Equitas, therefore the court should hold them liable for them these sums. They cite the statement of Bowstead and Reynolds on Agency (17th Ed) (2001) para 6-094 that "*when the agent cannot explain what has happened to money or property, presumptions may be made against him which will impose substantial liabilities*". Upon the first of the issues in relation to the monies claims, I have not found it necessary to resort to any such presumption (subject to hearing further submissions in relation to the small claim for Canadian dollars). It does not seem to me in view of the evidence about sums being previously paid that it would be proper to make any such presumption in relation to the second issue.

Costs

86. The court has a discretion as to whether costs are to be payable by one party to another: Civil Procedure Rules 44.3(1). If the court does exercise its discretion to make an order about costs, then "*the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party*" but *"the court may make a different order"*: CPR 44.3(2). In deciding what order to make the court must have regard to all the circumstances including the following:

"(a) the conduct of all the parties

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)": RSC 44.3(4).

The conduct of the parties to which the court must have regard includes "conduct before, as well as during, the proceedings", "whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue", "the manner in which a party has pursued or defended his case or a particular allegation or issue", and "whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim": RSC 44.3(5).

87. If the court makes an order that one party pay some of the costs of another party, the court may make these orders: that the party must pay "a proportion of another party's costs", that the party must pay "costs from or until a certain date only" and that a party must pay "costs relating only to a distinct part of the proceedings". However, the court must if practicable make one of the first two forms of order in preference to the third. See RSC 44.3(6) and (7).

88. Equitas submit that Horace Holman should pay their costs. They submit that this follows proper application of the "general rule" in RSC 44.3(2), and they would also argue, if they need do so, that the court should depart from the general rule to make an order in their favour.

89. Horace Holman say that once they had provided the composite account in February 2003 or at least when they made the June payments, the proper application of the general rule is that Equitas should pay their costs from that date. They also argue that the court should depart from the general rule in respect of costs incurred before June 2003. They refer to the "unreasonable and aggressive stance" that they say Equitas adopted in pre-action correspondence and assert that Equitas brought proceedings "precipitously and unnecessarily".

90. It is, I think, implicit in the submissions that were advanced on behalf of both parties that in substance the central issue between the parties is whether Equitas are entitled to an account (or possibly whether they are entitled to an account and also to have copies of Horace Holman's records in so far as they relate to business in which Equitas have an interest). Equitas do not, as I understand it, argue that because they have succeeded (in part) in the money claim, it should follow from that as a simple application of the general rule that they should be paid their costs by Horace Holman. For their part, Horace Holman accepted that the implication of the general rule is that Equitas are entitled to their costs until the composite account was provided or the June payments made. It is convenient first to consider Horace Holman's submission that thereafter they had a defence to the claim for an account and so the application of the general rule would lead to Equitas bearing the costs thereafter.

91. I am unable to accept this submission. Generally, of course, it is a defence to an action for an account that the accounting party has already given the account which has been adjusted and that the balance has been struck and paid: see Snell's Equity (31st Ed) para 18-26. However, in this case no account was adjusted between the parties and no balance was struck. It is not sufficient that the accounting party simply state to the other party an amount acknowledged to be due (or in this case to state that no amount was due): see ***Anglo-American Asphalt Co Ltd v Crowley Russell & Co Ltd,*** [1945] 2 AER 324. To treat the information provided by Horace Holman as amounting to a settled account would amount to saying that Equitas had waived or lost their right to challenge what Horace Holman said and to call for documents, and are to be taken to have accepted the information provided by Horace Holman. They never did so.

92. Moreover, as stated in Snell (loc cit) it is not always a good defence that an account has been given. Horace Holman and Equitas were in the relationship of principal and agent, that is to say in a fiduciary relationship. Where an agent has provided accounting information that is inadequate or unsatisfactory, either the court may decide that it would not be equitable to accept this as an account and order that the account be taken afresh, or the court may say that because of errors in the information, while it will be taken as the starting point for an account, the principal has liberty to challenge it by way of surcharging and falsifying: see ***Coleman v Mellersh,*** (1850) 2 Mac & G 309, 314 and ***Lambert v Still,*** [1894] 1 Ch 73, 84.

93. Here, in my judgment, the principal, Equitas, should as a matter of equity be entitled to reject the composite account as inadequate and to call for a fresh account. This is not a case in which there were simply errors in the composite account that Equitas were able to demonstrate and did demonstrate. The state of Horace Holman's records was such that any account taken by reference to the claim files alone was vulnerable to errors of just the kind that were found. It would not be right to place upon Equitas the burden of challenging the composite account by surcharging and falsifying. First, the composite account simply was not presented in sufficient detail for this: it did not state what had been received by Horace Holman and what had been paid to Equitas. It would not be right to impose upon Equitas the task of remedying the consequences of the deficiencies in the way in which Horace Holman had kept their records. Secondly, it was impossible for Equitas to challenge the accounts on the basis of the claims files alone, and Horace Holman were not willing to provide other records. They refused access to the IBA records and did not mention that they had the CAF's and remittance advices. Although Equitas were able to demonstrate some errors in the composite account and raise other questions about it through the River Thames exercises, the very criticisms that Horace Holman make of these exercises demonstrate the difficulties that Equitas faced because they were not provided with proper documentation.

94. Horace Holman argue, however, that once proceedings were brought, the proper procedures are governed entirely by CPR and more specifically the Practice Direction that supplements CPR Part 40. They therefore argue that, once Horace Holman had provided the composite account in accordance with the order of Langley J of 30 January 2003, paragraph 3 of the Practice Direction requires that any party who objects to it as containing

errors or inaccuracies must serve a written notice specifying the matters stated in paragraph 3.2. I am unable to accept this submission. The Practice Direction does not detract from the rights of a principal to require a fresh account. Equitas were always entitled to apply to the court for directions that a fresh account be taken: see paragraph 1.3 of the Practice Direction.

95. I conclude that the provision of the composite account and the June payments do not provide a defence to the claim by Equitas for an account and for the delivery to them of documents. As I have said, Horace Holman accept that prima facie Equitas are entitled to their costs up to the delivery of the account. In my judgment, Horace Holman are right to accept this. Equitas were entitled to proper information from their agent about what monies had been collected and that information had not been provided. They were justified in bringing proceedings to enforce their entitlement, and I consider that prima facie in these circumstances they are entitled to be paid the costs of bringing the proceedings. The implication of my conclusion that the composite account does not provide Horace Holman with a defence to the claim is that prima facie Equitas are entitled to the costs of continuing to pursue the action.

96. Indeed, since I consider that Equitas behaved reasonably and were justified in pursuing their claim after the composite account was provided, I would take the same view even if provision of the composite account does provide Horace Holman with a technical defence to the claim. Since Horace Holman's records were such that they were not able satisfactorily to demonstrate to Equitas how they had dealt with funds that they received on Equitas' behalf and have not been able to provide proper documentation to Equitas, Equitas should, in my judgment, be awarded the greater part of their costs.

97. However, Horace Holman argue that Equitas have acted unreasonably in relation to this litigation and therefore I should make a different order. They criticise Equitas' conduct before and after the proceedings were brought.

98. First, they say that Equitas were precipitous in bringing the proceedings, and were inappropriately aggressive in correspondence before October 2002. I am unable to accept that this criticism should affect my order for costs. DAC wrote an appropriate letter before action on 11 April 2002. On 20 June 2002 they again warned Horace Holman that proceedings were being prepared. The proceedings were not brought until 17 October 2002. This was over a year after Equitas had formally requested that Horace Holman transfer documents to which they were entitled and had threatened legal proceedings.

99. Secondly, Horace Holman say that Equitas sought relief to which they were not entitled in that they initially sought an account of what was received "per reinsurer", and sought the delivery of documentation. I am not persuaded by these criticisms. It was reasonable for Equitas to expect that a properly detailed account would show what funds had been received from what reinsurer, and in my judgment the claim for delivery of documents was justified.

100. It is said that Equitas put forward calculations as to monies held by Horace Holman which were not justified and did not stand up to examination. I have some sympathy with this observation, and I do not doubt that the dealings between the parties were somewhat exacerbated by this conduct on Equitas' part. However, it is fair to observe that Equitas expressed their calculations in tentative terms and were candid about the basis upon which they were presented. I do not think that Equitas "exaggerated [their] claim" in the sense contemplated by RSC 44.5(d), and I am not persuaded that this is a matter that should significantly bear upon my order as to costs.

101. For these reasons, I conclude that Horace Holman should pay Equitas their costs up to the time that the composite account was provided and the June payments were made.

102. I have found it more difficult to decide about the costs incurred thereafter. As I have said, I do not consider that the provision of the composite account and the June payments afford Horace Holman what would strictly provide a defence to Equitas' claim. However, the fact remains that, at the end of these expensive proceedings, Equitas have in fact achieved very little. Horace Holman submit that Equitas have decided not to pursue their claim for an account in circumstances in which they had, or had access to, the same information before they brought the proceedings as they had when they reached their decision, and also have not pursued their claim for the delivery of documents. Equitas had the claims files available to them before they brought the proceedings and Horace Holman argue those files "contained all the information necessary to ascertain the true state of the account between the parties and to ascertain what sums were owed to the Syndicates and Equitas by their reinsurers". Although this fails to acknowledge the extent of Horace Holman's duties, I am not able to dismiss the point entirely.

103. The question therefore arises whether Equitas pursued the proceedings after they should have appreciated that the expense of doing do was likely to be wasted. I am conscious of the dangers of hindsight. I am also conscious that the costs judge will only allow Equitas to recover costs that are reasonable and proportionate. Nevertheless, I consider that Equitas can be fairly subject to some criticism for pressing on with their claims after the June payments had been made and the theoretical River Thames exercise completed, that is to say after, say, the end of February 2004.

104. In Equitas' favour, however, I consider that the offer that they made to bring the proceedings to an end in their letter of 26 March 2006 should also be recognised. It is true that it was not a part 36 offer and the time for which it was open for acceptance was short, but it demonstrated that Equitas wished to draw an end to the wasteful expenditure on the litigation. Their offer was reasonable, even generous. Horace Holman's response was uncompromising.

105. My conclusion is that I should make an order as to costs and that the proper order in the unusual circumstances of this case is that Horace Holman should pay the costs of Equitas except for one half of the costs incurred by Equitas during the period of two years from 1 March 2004 to 28 February 2006. I have explained why I have identified that two year period, and despite my criticisms of Equitas I consider that it would not be right to deprive them of all the costs incurred during that period.

106. This decision is not based on the attitude that the parties have taken to ADR or mediation at and after the hearing on 27 February 2004, but this consideration, I think, provides further justification for the order that I propose to make. It is regrettable that the possibility of ADR was not, as I am driven to conclude from the evidence and in particular the Case Management Information Sheets, seriously considered by either party until July 2006 when Equitas adopted what in my view was a more reasonable position than previously. Until then, Equitas were apparently content to accept that Farrer & Co had no instructions about Horace Holman's position about ADR. There is no evidence that they requested Farrer & Co to obtain instructions, and they did not evince any real interest in ADR until July 2006.

Conclusion

107. I conclude that Equitas' money claim succeeds in the sums of US$ 34,614.01 and £3,018.57. I shall hear further submissions if Equitas wish to pursue the claim for Can $508. I order that Horace Holman pay to Equitas their costs of the proceedings except for half of the costs that Equitas incurred between 1 March 2004 and 28 February 2006.

108. For the avoidance of doubt I add this. I have referred to the fact that the parties do not ask me to make any determination as to whether costs incurred were reasonable or proportionate and envisage that that, if necessary, will be determined upon an assessment. Nothing in my judgment is intended to preclude Horace Holman from arguing upon an assessment either in respect of costs incurred during the period from 1 March 2004 to 28 February 2006 or in respect of other costs that any particular part of Equitas' costs was not proportionately and reasonably incurred or that it was unreasonable and disproportionate in amount.

Neil Calver QC (instructed by Davies Arnold Cooper) for the Claimant
Robert Anderson QC and Adam Tolley (instructed by Messrs Farrer & Co) for the Defendant