JUDGMENT : Mr. Justice Tomlinson: Commercial Court. 23rd June 2006.

1. Part VII of the Financial Services and Markets Act 2000 makes provision for the control and sanctioning of insurance business transfer schemes. Section 112 provides that if an order made under subsection (1) thereof makes provision for the transfer of property and liabilities, (a) the property is transferred to and vests in, and (b) the liabilities are transferred to and become liabilities of, the transferee as a result of the order. In such circumstances there is effectively a statutory novation. As is well known there has in recent years been significant mergers and acquisitions activity in the UK insurance market and consequent reorganisation and restructuring of existing insurance and reinsurance arrangements. This activity has spawned many Part VII schemes which have become an everyday incident of the London insurance market.

2. In this case an arbitration was begun in May 2005 apparently between reinsureds and reinsurers to enforce rights of recovery deriving from a contract of reinsurance first made in 1965. One of the two relevant reinsurers participated between 1965 and 1968, the other between 1966 and 1968. The contract had been duly performed without difficulty for about forty years. In early 2005 the reinsurers, perhaps because the run-off of their business was in new and common management, took the view that a significant number of the losses underlying claims presented to them for payment under the contract related or might relate to interests which could not properly be ceded to the contract. Reinsurers declined to settle further balances without first undertaking an inspection of underwriting and claims records. The reinsureds interpreted this as a delaying tactic and began the arbitration to which I have referred. Unfortunately the arbitration was begun in ignorance of a Part VII scheme by virtue of which the named claimants in the arbitration had become divested of their contractual entitlement. Equally unfortunately both reinsurers denied the existence of an arbitration agreement and one of the reinsurers denied the existence of any agreement at all, notwithstanding it had been honouring it for forty years. For reasons best known to themselves reinsurers declined to nominate an arbitrator, even without prejudice to their contentions, in consequence whereof the arbitrator initially appointed by the claimants became sole arbitrator in the reference. The reinsurers then discovered in their archives a treaty wording signed by one of the reinsurers which persuaded them to accept that the arbitrator thus appointed did indeed enjoy jurisdiction in respect of the claim brought against both reinsurers. Points of Claim were duly served and the reinsureds suggested that the reinsurers should pay the costs which they had incurred and, they said, wasted in the procedural wrangling to that date which I have barely summarised. At this point the reinsurers' solicitors discovered the existence of the Part VII transfer which meant that the arbitration had been begun in the wrong name. On the same day as drawing this to the attention of the solicitors for the named claimants the reinsurers commenced fresh arbitration proceedings against the transferee reinsured seeking inspection of underwriting and claims records and negative declaratory relief. It is said that the subject matter of this counter-arbitration is the same as that submitted to arbitration in the first reference.

3. The question which I have to decide is whether the first arbitration is effective. There is no question of time bar, and it may be wondered why it matters. The parties marshalled a formidable body of evidence and the argument before me occupied two days, unfortunately separated by nearly two months. The only real reason I can discern for these proceedings, apart of course from questions of costs and amour propre, is that the reinsurers have repented of their decision not to appoint an arbitrator in response to the appointment by the reinsureds of Mr. Tony Berry to act as their nominated arbitrator in the reference.

4. Astonishingly as it might be thought the reinsurers have in fact commenced not one but two counter-arbitrations. This is because on 1 September 2005 the reinsureds submitted further treaty statements to the reinsurers containing claims over and above those notified prior to 27 May 2005. It is said that since the second arbitration, or the first counter-arbitration, encompasses only what is in issue in the first arbitration, so the arbitrators therein cannot have jurisdiction to consider claims first notified subsequent to 27 May 2005.

5. The Claimants herein are the reinsurers, to whom I shall refer as "Harper/Turegum" and "River Thames" respectively. Both are in run-off. Responsibility for the run-off of both companies rests with Castlewood (EU) Limited. Mr. Alan Turner, senior manager of Castlewood, has the general responsibility for handling these claims. Castlewood has for some time had responsibility for Harper/Turegum but, as I understand it, it is only since October 2004 that it has had responsibility for River Thames.

6. The Defendants herein are the three reinsureds, two original and one transferee by reason of the Part VII transfer, to which I shall refer as "Indemnity Marine," "London & Scottish" and "Ocean Marine" respectively. All three companies are part of the Aviva/Norwich Union Group of companies. Apparently in 2000 Norwich Union reinsured its London Market & Global Risks portfolios with National Indemnity Company ("NICO"), which is part of the Berkshire Hathaway Group of companies. This reinsurance included the Indemnity Marine, London & Scottish and Ocean Marine books. As part of this arrangement the management and administration of the portfolios was transferred to NICO. However NICO in turn delegated the management of these portfolios to Resolute Management Inc, which is another Berkshire Hathaway company set up for the purpose of administering these portfolios. Thus apparently for many years Resolute has managed the books of business of each of the three Defendants. Within Resolute Mr. Greg Hutchings has general responsibility for the bringing of the reinsurance recovery claims which form the subject matter of the competing arbitrations.

7. According to the Points of Claim in the first arbitration, by a continuous contract of reinsurance bearing the reference 5899027 and commencing 1 January 1965 to take all business as may have been declared thereto by Indemnity Marine and London & Scottish on any interest whatsoever in accordance with a treaty wording

recorded in a memorandum dated 4 February 1965, Harper/Turegum and River Thames and/or their predecessors in title agreed for their respective proportions to reinsure Indemnity Marine and London & Scottish on the terms and conditions more particularly there appearing with regard to cessions made thereunder, to include business regarded by Indemnity Marine and London & Scottish as incidental Marine and/or business classified by Lloyd's as dual market business, whether of marine and/or non-marine and/or aviation character. The wording includes the following: -

"This Reinsurance is a Permanent Contract and is to take all business as may be declared by the Reinsured on any interest whatsoever as per Treaty Wording.

The Reinsurers agree to accept all business as may be declared by the Reinsured on any Interest whatsoever, subject to the limits and terms as under.

i) it is understood and agreed that cessions hereunder will include business regarded by the Reinsured as Incidental Marine and/or business classified by Lloyds as dual Market Business and may be of non-marine and/or marine and/or Aviation character. Treaties may be included hereunder subject to special agreement.

ii) …

iii) this Agreement is a permanent contract in respect of cessions allocated by the Reinsured to Contract "BW65" or appropriate designation for subsequent years and shall continue until terminated by either party given in writing three months notice of cancellation, all cessions allocated to this contract prior to the date of cancellation shall continue until their natural expiry…

iv) …

xvi) Disputes arising between the Reinsured and Reinsurers with respect to this Contract shall be referred to two arbitrators (one arbitrator to be appointed by each party) and an Umpire, who shall be appointed by the arbitrators before entering upon the reference. The award of the arbitrators, or the Umpire, as the case may be, shall be final and binding upon all parties without appeal. This Contract shall be interpreted rather as an honourable engagement than as a legal obligation and the award shall be made with a view to effecting the general purpose of this Contract rather than in accordance with the literal interpretation of its language. The Arbitrators and the Umpire may abstain from judicial formality and from following strictly the rules of law. Except as herein before provided, the terms of the Arbitration Act for the time being enforce shall apply to the arbitration. Arbitration is to take place in London."

8. It would seem that the underlying claims now in dispute are concerned with long tail business on risks declared to the treaty almost forty years ago. The dispute which appears to have crystallised is whether the treaty responds to Asbestos, Pollution and Health Hazard ("APH") losses, losses of which type are included in those currently being presented for collection. The Defendants say that the Claimants, together with the co-reinsurers, have been paying claims under the treaty without objection for over forty years and that such claims have included APH losses. The suggestion is that it is the involvement of Castlewood which has prompted a change of heart. By way of example the Defendants say that on 7 March 1996, at his request, a fax was sent to Mr. Linford, then of River Thames, now of Castlewood, attaching a copy of the unsigned treaty wording and a schedule of environmental losses attaching to the treaty which included Eli Lilly, Asbestosis, Agent Orange and "Other Environmental." At that time Mr. Linford for River Thames apparently did not question the contractual force of the treaty nor did he raise objection to the type of losses which were being presented for collection thereunder. The claims were paid. Thus when in February 2005 Mr. Linford, now of Castlewood, wrote to Mr. Hutchings of Resolute seeking on behalf of Harper/Turegum and River Thames an inspection of the underwriting and claims records relating to the various treaty years participated in by the two Castlewood managed entities, this was interpreted by Resolute as an attempt to delay payment of legitimate claims, an impression reinforced by subsequent doubts raised as to the existence of any binding wording or even as to the participation of the River Thames at all. I pause here to note that it is now accepted that Harper/Turegum subscribed to the treaty for the period 1965 to 1968 and River Thames for the period 1966 to 1968. Indemnity Marine and London & Scottish were at all times the two named reinsureds.

9. On 21 February 2005 Mr. Hutchings of Resolute by letter to Mr. Linford of Castlewood acknowledged the latter's desire to undertake an inspection of the underwriting and claims records relating to the treaty between 1965 and 1968. Mr. Hutchings continued: -

"Further to your letter dated 18th February 2005 we acknowledge your desire to undertake an inspection of the underwriting and claims records relating to the above mentioned treaty between 1965 and 1968.

Currently we have substantial balances owed from the Castlewood entities on this treaty and having read the wording the reinsurance treaty does not include an inspection of records clause. We therefore assume that you are relying on an implied right to inspect. With this in mind please can you supply us with your reasons for requesting the inspection especially considering the age of the treaty."

10. Very quickly an impasse developed, with reinsurers unwilling to settle further claims without an inspection, and reinsureds unwilling to permit an inspection without prior settlement of outstanding claims, albeit under a full reservation of rights. Plainly if the impasse could not be resolved by agreement, with each side reserving its rights, it fell to be resolved in accordance with the dispute resolution procedure agreed by the parties. In a letter of 15 March 2005 Mr. Linford of Castlewood said that Castlewood had not yet had the benefit of a sight of the

contract wordings, and asked for copies, and noted also that at the time of its original request for inspection Castlewood had been unaware of the Harper/Turegum involvement in the treaty. In this letter Mr. Linford referred to the treaty as a "Cargo Quota Share." I infer from the reply to this letter, written on 31 March 2005, that the brokers then made their files available to Castlewood, including, I infer, an unsigned treaty wording, the intention being to disabuse Castlewood of the notion that the treaty was properly to be described as a Cargo Quota Share. At all events whatever was supplied was insufficient to persuade reinsurers to resume paying claims, or to abandon their request for inspection of records.

11. In May 2005 Mr. Hutchings of Resolute instructed Messrs Waltons and Morse to commence arbitration proceedings against reinsurers to recover unpaid balances due under the treaty. He instructed them to commence proceedings in the name of Indemnity Marine and London & Scottish. He had heard in February 2003 that the Norwich Union Group of companies was considering consolidating a number of its constituent companies into a single entity, a consolidation which he understood would take effect pursuant to the provisions of Part VII of the Financial Services and Markets Act 2000. He was aware of some exploratory discussions in the months which followed, but he did not in May 2005 appreciate that the Part VII transfer was even imminent, let alone that it had become effective on 28 April 2005.

12. As is well known Part VII transfers are widely publicised in the market and the relevant procedures in any event prescribe publication by way of notice of the hearing of applications to the Court to be given in certain newspapers and journals, including The Times, the Financial Times and The London, Edinburgh and Belfast Gazettes. In the light of this I was surprised when in the first minutes of the first hearing Mr. Reeve for the reinsurers told me that he thought that it was common ground that the reinsurers had no means of being aware of the transfer which had here taken place. In response to my query Mr. Phillips for the reinsureds told me that it was not common ground. I indicated that I doubted it would be, since I would have expected a reorganisation of that sort almost certainly to have been circulated around the insurance market. Mr. Reeve agreed that normally that was indeed the case but indicated that the reinsurers had tried to look into it and had found no information of that sort. Mr. Reeve did not suggest that the proper procedures were not observed on this occasion but he did point out that there was at that stage no attempt to suggest that the reinsurers had had notice of the Part VII transfer before beginning their own counter-arbitration. I appreciate that the reinsureds had not at this stage for the purposes of the hearing before me furnished evidence of the steps taken to publicise the Part VII transfer. Nonetheless the suggestion that the reinsurers had had no means of knowledge of the transfer was a surprising one, and by the time of the second hearing it had, as one would have expected, been shown to be wrong.

13. On 16 December 2003 a notice of proposal to transfer the general insurance business of certain subsidiaries within the CGU International Insurance PLC group to Ocean Marine Insurance Company Limited pursuant to Part VII was sent to the Head of Reinsurance at River Thames, on the basis that CGU believed that River Thames may have insured some of the business to be transferred. The notice continued: -

"The Scheme will have the effect of transferring all the Subsidiaries general insurance business including those assets and policies relating to reinsurance to Ocean Marine. The only change from a reinsurers perspective will be that from the effective date the Subsidiaries' reinsurance covers will be provided to Ocean Marine. Following the Scheme, we will make any necessary administrative changes and settlements would continue to be made in the usual way.

We should be grateful if you would acknowledge receipt of this letter and indicate that you have no objections to our proposals by signing and returning the enclosed copy of this letter using the stamped address envelope provided by 16 January 2004."

After chasers the notice was returned by Mr. Alan Turner of Castlewood duly signed on behalf of River Thames. In so doing Mr. Turner described himself as Chief Executive of River Thames.

14. A similar notice was sent on 16 December 2003 to Claims Management Group Limited who then managed the run-off of Harper/Turegum. It suffices to say that after provision of further information concerning the security offered by Ocean Marine those responsible for Harper/Turegum indicated that they had no objection to the transfer proposal.

15. The "Application" for an order sanctioning the transfer was presented on 9 March 2004 and directed to be heard before the Companies Court on 12 May 2004. Formal notices of the Application and of the hearing date were despatched by Messrs Burrups on 10 March 2004 to the Chief Executives of 467 reinsurance companies, including Harper/Turegum c/o CMGL and River Thames c/o Castlewood. Insofar as it is necessary or relevant I find that those notices were probably duly received by those who had responsibility for the affairs of Harper/Turegum and River Thames. Formal notice of the date for the hearing of the Application was also given by means of notices in The Times on 10 March 2004 and in the Financial Times, The London Gazette, The Edinburgh Gazette and the Belfast Gazette all on 11 March 2004. There were hearings before the Companies Court on 12 May 2004, 17 December 2004 and 25 April 2005. The Scheme was sanctioned by the Court. The variation of the Effective Date for the Part VII Transfer from 30 December 2004 to 30 June 2005, as ordered on 17 December 2004, was publicised in the Financial Times on 24 December 2004. The variation (advancement) of the Effective Date from 30 June 2005 to 28 April 2005, as ordered on 25 April 2005, was publicised in the Financial Times on 3 May 2005.

16. In case it is necessary or relevant I find that Mr. Paul Bugden, a partner of Messrs Clydes who later was instructed on behalf of reinsurers, had no contemporary knowledge of the minutiae of the Part VII transfer. Mr. Bugden has

taken an interest in Insurance Business Transfer Schemes and has contributed to the literature on the subject. The suggestion that when he came to be instructed in this matter he would have appreciated without more that the business of Indemnity Marine and London & Scottish had been the subject of a Part VII transfer is fanciful. Those responsible for the run-off of the business of Harper/Turegum and River Thames would have had more reason to take more notice of the details, not least because in these matters insurers, reinsurers and run-off managers in the London market seek reciprocity. Thus when the notice came to Mr. Turner's attention as described in paragraph 13 above he realised that only months previously he had approached Mr. Patrick Snowball of Aviva soliciting Aviva's support for a proposed Part VII transfer of another book of business managed by Castlewood. Mr. Turner was in part motivated to indicate support for Aviva's proposals by the hope that he would get similar support if and when Castlewood's proposals progressed. I would not expect the details of any of these transfers, whether proposed or actual, to have remained long in the minds of those who had no need of a day to day appreciation of the up to date position. Of more significance in my judgment is the fact that all those in the market would have a ready appreciation of the fact that, when handling forty year old business, the chances are high that the corporate entities on both sides of the transaction will have undergone some sort of reorganisation or reconstruction, particularly in more recent years through the vehicle of a Part VII transfer. Thus when the arbitration came to be commenced on 27 May 2005 I would not expect either those who commenced it or those who received notice of its commencement to have attached any importance whatsoever to the precise contemporary description of the corporate entities which comprised reinsureds and reinsurers. It was an arbitration to recover outstanding balances under the Bland Welch treaty from those who now represented the participating reinsurers Harper/Turegum and River Thames. The claim was brought by the reinsureds under the treaty. They were companies in what was by now the Aviva/Norwich Union Group of companies. Originally they were Indemnity Marine and London & Scottish. It would have surprised no one if the arbitration had been launched in the name of a different company or companies now enjoying rights derived from the original reinsureds. All that was of significance was that the reinsureds under the treaty were seeking payment of claims allegedly due.

17. Mr. Tony Berry enjoyed a distinguished career as an underwriter in the London market and particularly at Lloyd's and he is now active in insurance and reinsurance dispute resolution both as an expert witness and as an arbitrator. Messrs Waltons and Morse wrote to him on 27 May 2005 in these terms: -

"Bland Welch Treaty Ref: 5899027

Reinsured: Indemnity Marine Assurance Company Limited And/Or London & Scottish Assurance Corporation Limited

Turegum Versicherungsgesellschaft (Years: 1965 To 1968)

River Thames Insurance Company Limited (Years: 1996 To 1998)

We refer to our conversation just now (Purssell/Berry) and are grateful to you for accepting an appointment as arbitrator on behalf of our clients, Indemnity Marine Assurance Company Limited and London & Scottish Assurance Corporation Limited. The reference is commenced under the above referenced Treaty against Turegum Versicherungsgesellschaft and River Thames Insurance Company Limited to recover all sums currently due and owing to our clients.

In this regard, a copy of the Treaty wording is enclosed for your records."

18. I have already set out above Clause 16 of the Treaty wording.

19. On the same day Messrs Waltons and Morse wrote to Harper/Turegum at their addresses in London and Zurich, to River Thames at its London address and to Castlewood as follows: -

"Bland Welch Treaty Ref: 5899027

Reinsured: Indemnity Marine Assurance Company Limited And/Or London & Scottish Assurance Corporation Limited

Years: 1965 To 1968 (Turegum) And 1966 To 1968 (River Thames)

We have been instructed on behalf of Indemnity Marine Assurance Company Limited and London & Scottish Assurance Corporation Limited to commence arbitration proceedings against you to collect all balances currently due to them under the Bland Welch Treaty reference above.

In this regard, we attach a copy of our letter to Tony Berry confirming his appointment as arbitrator on behalf of our clients pursuant to Clause 16 of the Treaty wording. Please now appoint your arbitrator within 14 days in accordance with Section 16 (6) of the Arbitration Act 1996."

20. Harper/Turegum and River Thames did not respond by appointing their arbitrator. On 10 June 2005 Castlewood responded on their behalf as follows: -

"Bland Welch Treaty Ref: 5899027

Reinsured: Indemnity Marine Assurance Company Limited And/Or London & Scottish Assurance Corporation Limited

Years: 1965 To 1968 (Turegum) And 1966 To 1968 (River Thames)

We represent Harper Insurance Limited (formerly known as Turegum Insurance Company – "Harper") and River Thames Insurance Company Limited ("River Thames") and refer to your correspondence of 27 May 2005. We respond to the abovementioned correspondence on behalf of both companies merely for the sake of convenience.

In your abovementioned letter, you purport, on behalf of your clients, to commence arbitration proceedings against Harper and River Thames for balances allegedly due under the above captioned treaty.

We consider your Notice of Arbitration to be defective on a number of grounds:

1. You attach a copy of a "Memorandum of Reinsurance effected by Bland, Welch & Co Ltd …" dated February 1965. The document is not signed and in the absence of production of a wording signed by Harper, we cannot accept that you have established the existence of an arbitration agreement.

2. The document as described in 1 above does not relate to business in which River Thames participated. You provide no wordings relating to River Thames, signed or otherwise. Again, your clients have failed to establish the existence of an arbitration agreement with River Thames.

3. Your Notice of Arbitration purports to commence proceedings against both Harper and River Thames. Even if one ignores the fact that you have failed to demonstrate arbitral jurisdiction in relation to either company, it is a fact that River Thames did not assume any risk in relation to the 1965 year of account. Even if there were arbitration proceedings between the parties, the claimant/s is/are not at liberty to assume that parties to any proceedings will agree to a request to have such proceedings consolidated. Such consolidation may be achieved only by agreement between the parties.

As a separate issue, we find your clients' decision to commence arbitration proceedings entirely misplaced and premature. Our respective clients have been in discussions in relation to the alleged balances. Our clients have explained both in correspondence, as well as in a recent meeting, the reasons for which such balances have not been agreed. Our clients have further furnished your clients with repeated requests for documents necessary for them to review and establish their liability, if any. More importantly, our clients have requested that they be allowed to carry out an inspection, which they hope will assist in progressing matters. Your clients' responses to such requests have neither been forthcoming nor indeed in the spirit of co-operation or willingness to move this matter to resolution.

In light of the above:

1. We invite your clients either to provide evidence that arbitration agreements exist or to accept that a dispute must be determined by the courts:

2. In the light of the foregoing, you will appreciate that our clients consider that Mr. Berry has not been validly appointed and has no jurisdiction to enter into arbitration in relation to the matters under discussion."

21. A copy of this letter was sent to Mr. Tony Berry.

22. On 20 June 2005 Messrs Waltons & Morse responded as follows: -

"**BLAND WELCH TREATY ARBITRATION**

1. We refer to your faxed letter of 10th June.

Litigation?

2. We note your invitation to our clients either to evidence the existence of arbitration agreements between our clients and Harper Insurance Limited (Formerly Turegum Versicherungsgesellschaft) for the years 1965 to 1968 on the one hand and River Thames Insurance Company Ltd for the years 1966 to 1968 on the other or to accept that the disputes should be determined by the courts.

3. It is our view that there are undoubtedly binding arbitration agreements as between the parties as outlined above (which incidentally need only be in writing, with no requirement for signature). However, to be absolutely clear, is it your principals' position that these disputes should be determined by the courts? If so, our clients would be happy to proceed in that forum provided that your principals do not then seek to challenge the court's jurisdiction on the basis of the arbitration agreements. Please could you clarify their position?

4. If they are content to proceed in litigation, please could Harper/Turegum confirm that proceedings served on either or both companies by sending the same by first class post to 1 Stoke Road, Guildford will constitute good service or otherwise please advise whether they are prepared to appoint solicitors to accept service?

Arbitration?

5. If your clients are not prepared to agree that the disputes should be resolved by the courts then please accept this fax as notice requiring your principals to appoint their arbitrator within 7 clear days, failing which we will proceed to appoint Mr Berry as sole arbitrator pursuant to Section 17 of the Arbitration Act 1996. In this eventuality, we will be asking Mr Berry to treat each reference as separate and distinct.

6. If, on the other hand, you do not nominate your principals' arbitrator within the above timeframe, please could you advise whether they are willing to proceed on the basis of consolidating references? The case for this in terms of efficiency and economy is overwhelming.

7. Our clients reserve the right to produce a copy of this correspondence to the court or Tribunal, as appropriate."

23. This drew the following response from Castlewood on 24 June 2005: -

"**Bland Welch & Co Limited Treaty Ref 5899027**

Reinsured: Indemnity Marine Assurance Company Limited And/Or London & Scottish Assurance Corporation Limited

Years: 1965 To 1968 (Turegum) And 1966 To 1968 (River Thames)

We refer to your letter of 20 June 2005,

As stated in our letter of 10June, our clients consider the commencement of any form of litigation entirely misplaced and premature in the light of your clients' failure to deal with enquiries and requests for inspection. Please advise by return whether your clients will now respond fully to the requests our clients have made so that the matter can be dealt with in a fully informed and proper manner.

Our clients' position is that they do not accept that your client has commenced a valid arbitration in the absence of evidence that an agreement to arbitrate has been concluded with either of our clients. You merely assert "that there are undoubtedly binding arbitration agreements as between the parties", in circumstances where we have clearly put the purported existence of such agreements in issue. Please produce the evidence to support your assertions.

If you fail to establish that arbitration agreements exist, it follows that the purported arbitrations are invalid and that Mr Berry has not been validity appointed. Consequently, he cannot be appointed as sole arbitrator. What other steps or form of litigation your clients may instruct you to take is a matter for them.

Pending a full answer to the matters raised above – which were also raised in our letter of 10 June, 2005 – our clients' position remain fully reserved."

24. On 30 June 2005 Messrs Waltons & Morse replied in these terms: -

"**BLAND WELCH TREATY ARBITRATION**

We refer to your letter of 24th June and note that you have failed to respond substantively to our fax of 20th June.

It is insufficient merely to say that you have "*put the purported existence of such [arbitration] agreements in issue*". Either there are or there are not, arbitration agreements in force between our respective clients/principals. Your principals have paid claims under agreements in writing containing an arbitration clause for the best part of 40 years. It cannot sensibly therefore be suggested that there are no binding arbitration agreements (which need only be in writing or evidenced in writing, not necessarily signed). Nevertheless, in your letter of 10th June you invited our client to have the dispute(s) determined by the courts, whilst stating that Mr. Berry had no jurisdiction in this matter as arbitrator.

If your clients genuinely believed that there are no arbitration agreements in place, the proper approach is nevertheless to appoint an arbitrator or arbitrators under reservation(s) of the rights and then make an application to the tribunal to determine its own jurisdiction under Section 30 of the Arbitration Act 1996.

Our clients are not prepared to tolerate any further prevarication on your part. Please therefore let us know your principals' position on the following: -

1. Are they prepared to abide by the terms of the arbitration agreement(s)?

2. If so, will they now appoint their arbitrator?

3. Alternatively, do they agree to have the disputes determined by the courts?

4. If they prefer (or require) the claims to be brought in litigation, do they undertake not to try to challenge the court's jurisdiction on the basis of the existence of arbitration agreements?

5. If their preference/requirement is for litigation, are your clients willing to nominate solicitors to accept service of proceedings on their behalf?

These questions invite "yes" or "no" answers, except for number 5, which requires elaboration if the answer is "yes". Please note that clear and unequivocal answers are required to the above questions within 7 days of the date of this fax. If no, or no satisfactory answers are received within that timeframe, our clients reserve the right to proceed as they see fit. To be clear, their options include (but are not necessarily limited to) appointing Mr. Berry to proceed as sole arbitrator (unless, of course, your clients have nominated their arbitrator, whether under a reservation of rights or otherwise) or to accept your principals' repudiation of the arbitration agreement(s) and/or to accept their invitation to proceed with the litigation.

We continue to reserve the right to produce these exchanges to the court or tribunal, as we see fit.

We have shown a copy of your letter of 24th June to our clients. Insofar as you assert that the commencement of arbitration is premature, our client's Richard Chilvers has prepared a response, a copy of which is attached."

25. Thus by now the reinsureds had twice extended time for appointment by the reinsurers of their arbitrator and had pointed out to them that they could make such an appointment under a reservation of rights, and then seek a determination by the tribunal of the jurisdiction issue under the procedure provided by Section 30 of the

Arbitration Act 1996. It was suggested by Mr. Reeve for the reinsurers that I should regard their reluctance to appoint an arbitrator under reservation of rights as motivated by their desire not to prejudice their position under Section 72 of the Arbitration Act. I reject that suggestion because there is no evidence to support it. Given the enormous volume of evidence deployed by the parties on this application the absence of evidence that anyone had this suggested consideration in mind is more than usually telling. There is no evidence that any of those then handling the matter for reinsurers thought that appointment of an arbitrator without prejudice or under reservation of rights might prejudice their position whether under Section 72 or at all. A party who appoints an arbitrator expressly without prejudice to his contention that there is no arbitration agreement will not ordinarily without more lose his right to question whether there is a valid arbitration agreement. The reinsureds' solicitors having gratuitously advised the reinsurers of their option to appoint an arbitrator under reservation of rights, it would hardly lie in the mouths of the reinsureds to argue thereafter that by adopting that course the reinsurers had lost their right to question the existence of the arbitration agreement, which could most conveniently at that stage have been done under the procedure envisaged by Section 30. Any decision by the arbitrators as to jurisdiction could have been challenged as of right under Section 67 of the Act. The right of challenge is not lost by appointment of an arbitrator under protest that the tribunal lacks substantive jurisdiction – see Section 73 of the Act. See also Section 31(1) of the Act.

26. The final paragraph in Messrs Waltons & Morse's fax of 30 June 2005 referred to a response prepared by Mr. Richard Chilvers of Resolute. That letter helps to put into context the stances being adopted by the respective parties. He wrote as follows: -

"With reference to your letter to Waltons & Morse of 24th June 2005, a copy of which has been passed to me.

We would like to address your suggestion that your clients "consider the commencement of any form of litigation to be entirely misplaced and premature in the light of your clients' failure to deal with enquiries and requests for inspection".

As a background our Treaty accounts up to 1st Half Year 2004 were submitted to CMGL in September 2004. We were advised by CMGL in late October that although they could have agreed these the sale to Castlewood had just been announced and their authorities withdrawn. In spite of various telephone conversations and E-mails to Martin Wynn at Castlewood in November/December and thereafter with James Linford requesting agreement, it was not until 18th February 2005 that a letter was sent to us requesting an inspection. In the meantime we had answered all queries raised by Kinsale in December 2004 in respect of the River Thames involvement on this contract.

Although, as we pointed out in our letter of 21st February 2005, the contract wording does not include an inspection of records clause, we indicated that we would be prepared to allow an inspection on receipt of settlement of the outstanding balances (which by this stage, as detailed above, were already long overdue) subject to a full reservation of rights. As matters did not progress, we requested a meeting with Alan Turner in April in order to try to move things forward amicably and reiterated our offer. In spite of his indication to the contrary Alan then responded on 29th April by saying that no settlement could be made prior to inspection. It was only after we advised Alan that in view of the fact that Castlewood seemed to have no intention of settling these valid claims we would, regrettably, have to resort to legal means to recover the amounts due that he was "prepared to consider" making a token offer of less than 15% of the outstanding debts.

At this stage, after various request, we had received some detail of the information which Castlewood were seeking to obtain from their inspection. We pointed out various articles in the wording of the contract (supplied on their request) which indicated that they were not entitled to this information. Notwithstanding this, we committed to endeavour to supply the detailed information they required for future quarters presentation, once settlements were brought up to date. This was also refused. We did not address any of the other questions relating to the placement of contracts, which of course have been running for 40 years and which Castlewood themselves had been settling on behalf of River Thames, as they were not entitled to this and we also saw this as yet another method of delaying settlement. We were confident, from our experience of Castlewood's actions in the past, that answers to these questions would simply have been followed up with a list of further questions in order to further delay.

We therefore feel that this demonstrates clearly that our actions were in no means premature. We made it perfectly clear throughout that we were prepared, if reluctant, to take legal action if Castlewood continued to delay settlement. We also tried throughout to avoid going down the legal route but felt that we were given no alternative as your clients seemed intent on delaying/avoiding settlement."

27. The final relevant exchange in this correspondence is Castlewood's letter of 8 July 2005 to Waltons & Morse. It reads as follows: -

"We refer to yours and Mr Chilvers' letters of 30 June 2005. We respond to your correspondence on behalf of both our clients, again, for the sake of convenience.

We reiterate our view that your clients' instructions to commence arbitration are entirely premature and misplaced.

We are obviously aware of the events set out in Mr Chilvers' letter, although we wish to state that our clients do not entirely agree with his version of events and that prior to receiving the notice of arbitration on 31 May believed that our respective clients would be able to reach a satisfactory outcome to this matter. Mr Chilvers argues that the treaty wording does not include a right to inspection. Regardless of the treaty wording (whether or not it was agreed), our clients have a right of inspection under common law. We believe that your client has wrongly denied our clients the

right to inspection. If your client were willing to allow a proper inspection, beyond the unsigned copy of the alleged treaty wording, it is unlikely that there would be any need for any further recourse to either a tribunal or the Courts.

You will appreciate that there is a serious issue here as to whether it was permissible to cede non-marine risks to what was clearly a marine treaty. Both the slip and all statements submitted indicate that the treaty was in respect of marine cargo business. One concern is whether the Price Forbes lineslip has been ceded properly or at all so as to entitle your client to claim losses in their entirety thereunder regardless of whether they were pure non-marine losses and/or went beyond incidental non-marine losses. Our clients have seen no evidence that wordings were agreed which in any way altered the marine cargo nature of the treaty. They would like to establish the position by reference to all available documents, whether this be part of the normal claims adjusting process, via an inspection or via litigation/arbitration. Whichever route is taken, your client must understand that the provision of this information is of paramount importance to this issue.

We reiterate our clients' request for inspection, which, we have no doubt, any tribunal or Court would consider us entitled to.

In any case, we repeat our position that your client has not commenced a valid arbitration. You state that you rely on the terms of the treaty wording, which has been provided to us, is unsigned, you point out that there is no necessity for an arbitration agreement to be signed. However, there still needs to be an agreement and we have seen no evidence that our clients were aware of the treaty wording, let alone agreed to it. We await evidence from you to prove that there is an effective agreement to arbitrate before we accept the validity of the appointment of Mr Berry as arbitrator.

We are under no obligation to respond to the questions set out in your letter, which frankly cannot be answered until you clients produce the documents which our clients have asked me to see, and do not intend to do so until our client's requests and queries have been satisfactorily answered."

28. The history thereafter can be shortly stated. On 21 July 2005 Waltons & Morse provided to Mr. Berry and to Castlewood ILU slips for the treaty years 1966 to 1968 pursuant to which premium signing numbers were allocated relevant to the participation of River Thames in those years. Evidence was produced showing that Harper/Turegum had in October 2004 been fully aware of the content of the treaty wording including the arbitration clause and had not questioned the same. It was again pointed out that the reinsurers could have appointed without prejudice and invited the tribunal to determine its own jurisdiction but that they had opted not to do so. On 27 July 2005 Castlewood wrote again to Messrs Waltons & Morse, in the course of which they said this: -

"…

Resolution of Current Dispute

We wish to clarify our clients' position with regard to the above treaty. Our clients have not contended that they are not party to the relevant slips attached to your letter to Mr Tony Berry of 21 July 2005, although the extent of their liability under such slips is, of course, in dispute and as our clients have yet to be given sufficient information to enable them to ascertain this liability or to adjust claims under those slips, their position is fully reserved. Indeed, our clients have been paying claims pursuant to those slips for almost four decades.

What your clients have failed to establish is the existence of an agreed treaty wording containing a valid arbitration clause. Notwithstanding numerous requests, your clients have failed to provide any evidence that the unsigned wording upon which you purported to rely in support of the commencement of arbitration was either agreed or even acknowledged by our clients. Absent such confirmation, our clients do not consider themselves bound by the arbitration clause, by the purported commencement of arbitration or by the purported appointment of Mr Berry. This letter is copied to Mr Berry only as a matter of courtesy and on the basis that he is included in the communication without prejudice to our clients' previously stated positions.

That said, it is clear that there is now a dispute between our clients exacerbated by your clients' decision purportedly to commence arbitration proceedings without allowing our clients access to their books and records or to the information that our clients have reasonably requested to enable them to properly review the claims at issue. We maintain that such a dispute can and should be resolved by way of discussion and agreement between the parties. If your clients insist upon a litigious approach, however, we see no option but for them to commence court proceedings. It will no doubt be obvious from our comments above that our clients will not be seeking to argue that the Court proceedings should be stayed pending arbitration, as they have consistently maintained there is no agreement to arbitrate. However, for the avoidance of doubt, we confirm that if your clients do commence proceedings against our clients in the High Court of England and Wales, they will not object to the same grounds of jurisdiction regardless of any subsequent argument, submission or determination regarding the applicability of any treaty wording in respect of which our clients' rights are fully reserved. We confirm that should your clients choose to proceed to court, the undersigned is authorised to accept service on their behalves.

Finally, our clients continue to consider your client's purported commencement of arbitration to be wholly premature and inappropriate. Regardless of the outcome of any subsequent court proceedings, our clients refuse to be responsible for any of the costs incurred by your clients in purportedly commencing such arbitration proceedings, including the fees of Mr Berry.

…

Finally, for the avoidance of doubt, we write this letter on behalf of both River Thames Insurance Company Ltd and Harper Insurance Ltd for the sake of convenience and without prejudice to each company's position that the claims against them are entirely separate and should be treated as such. This has been our clients' position from the outset."

29. On 5 August 2005 Mr. Berry announced his conclusion that there is a valid arbitration agreement between the parties in terms of Clause 16 of the Memorandum of Reinsurance and confirmed his appointment as sole arbitrator. Pursuant to Section 30 of the Arbitration Act he declared that the tribunal was properly constituted.

30. On 9 August 2005 Messrs Clydes wrote to Waltons & Morse and to Mr. Berry to say that they had been instructed. Apparently they had been instructed to consider a challenge to the award on the grounds of non-incorporation of the arbitration clause. On 26 August 2005 Clydes wrote to Waltons & Morse with copy to Mr. Berry as follows: -

*"**Claimant (Reinsured): Indemnity Marine Assurance Company Limited and/or Scottish Assurance Corporation Limited***

Respondent: (1) River Thames Insurance Company Limited ("River Thames") (1996 to 1968) and (2) Harper Versicherungs AG ("Harper") (1965 to 1968)

We refer to our earlier correspondence on this matter.

Since receiving the decision of Mr Berry of 5th August 2005, our clients have undertaken a further review of their books and records in a final attempt to locate any evidence to establish that the wording provided by your client is, indeed, the correct treaty wording. They have, in the last few days, found one further bundle of documents in a deep archive of papers kept by Harper (formerly Turegum). Our clients only purchased Harper in the last year and were previously unaware of these further files of papers.

As you will see from the attached document, included in this file of papers is a treaty wording for the 1965 policy year signed (in 1968) by Harper. This is the first time that our clients have been able to establish the existence of an agreed treaty wording, your clients having failed, hitherto, to provide any evidence that such a wording was agreed. It is to be noted that this treaty wording is only for one of the three relevant policy years, and that there is no evidence that the wording was ever agreed by River Thames. Notwithstanding this, our clients accept that the decision of Mr Berry as to the applicability of the treaty wording and his own jurisdiction is correct and they will not challenge the same on behalf of either Harper or River Thames.

We must now move to the substance of the underlying dispute. We understand that you are in the process of settling with Counsel Points of Claim in the arbitrations. It would be helpful at this stage if you would indicate what claims are to be subject to arbitration as, in view of the likely defences to be raised by our clients, there is likely to be the need for substantial disclosure. It would be helpful if this is addressed sooner rather than later in order that we can consider, in light of the list of claims, what disclosure is likely to be necessary.

We look forward to hearing from you."

31. Thus all seemed set fair for the arbitration to proceed. On 31 August 2005 Points of Claim were served. As well as a declaration that the Respondents are liable to indemnify the Claimants in accordance with the terms of the reinsurance contract the Claimants claimed the balances due under the treaty statements as at, I think, 2 March 2005 which cover, I think, the period 1 July 2004 to 31 December 2004. On 1 September 2005 further treaty statements were presented by the brokers to the reinsurers, covering the six month period from 1 January 2005 to 30 June 2005. On 6 September 2005 Waltons & Morse wrote to Clydes and Mr. Berry as follows: -

"Following service of our clients' Point of Claim on Wednesday 31st August 2005, our clients have provided us with copies of their letter to the broker (Marsh Limited) and latest statements of account in respect of the Bland Welch Treaty for the period from 1st January 2005 to 30 June 2005.

We have asked the broker to provide us with a copy of the Treaty Statement (which is customarily provided by the broker to your clients) which we shall forward to you so that you have details of the amounts involved.

Pending receipt of and production to you of the copy of Treaty Statement, we consider that the best approach would be for the parties to agree that the sums mentioned in our clients' Points of Claim are deemed amended so as to include the sums which are the subject of the latest Treaty Statements/Collections from your clients, thereby removing the need for us to formally amend the Points of Claim and incur further costs.

We should be grateful if you would confirm your agreement to our suggestion."

32. It seems that at this time Mr. Bugden of Clydes became curious about wording on the Resolute letter paper which led him to speculate as to the management arrangements in place. Research conducted at his request brought to light the Part VII transfer, with the consequences which I have already described.

33. On 28 September 2005 the reinsurers issued these proceedings, which were subsequently reissued on amendment. A panoply of relief is sought but the essential question is whether the appointment of Mr. Berry was effective to begin an arbitration to which Ocean Marine, Harper/Turegum and River Thames are now parties.

34. On 3 October 2005 Mr. Berry made an order substituting Ocean Marine as Claimants in the arbitration. He gave his reasons as follows: -

"I refer to the extensive correspondence between the parties, for which I thank them, and the application of Waltons & Morse to add and/or substitute Ocean Marine as Claimants in this action. I have reviewed the correspondence and submissions made by each side.

In my view, the issue is one of form rather than substance. For the following reasons, I grant the application made by Waltons & Morse to substitute Ocean Marine Insurance Company Limited as Claimants in this arbitration.

1. *The spirit of the honourable engagements clause in the treaty wording is to avoid delay of the resolution of the matter caused by a technicality un-related to the issues in dispute. I consider the intention was to bring a claim for balances due under the treaty. It is clear that neither party was aware of the part VII transfer of insurance business to Ocean Marine in the first instance and in these circumstances, the commencement of the proceedings in the names of Indemnity Marine Assurance Company limited and London & Scottish Assurance Company Limited was an oversight.*

2. *Neither party has been able to demonstrate that they will suffer prejudice as a result of the substitution of Ocean Marine for the current claimants.*

In these circumstances, I am satisfied that the appropriate course of action to take is to allow the application to substitute Ocean Marine as Claimants in this action."

35. On 21 October 2005 reinsurers commenced a second arbitration against Ocean Marine seeking an inspection of records and a declaration that they are not liable (or as to the extent of any liability) in respect of claims contained in the treaty statements submitted on 1 September 2005.

36. On 26 October 2005 Mr. Berry issued a further award allowing the additional claims contained in the treaty statements submitted on 1 September 2005 to be pursued in the arbitration before him and allowing Ocean Marine to serve Amended Point of Claim.

37. Thereafter reinsurers amended their Claim Form (with the consent of Indemnity Marine, London & Scottish and Ocean Marine) to include challenges to Mr. Berry's awards of 3 October 2005 and 26 October 2005. One of the new points thereby taken is that by the time Mr. Berry came to give leave to the reinsured to amend its Points of Claim so as to include the later arising claims those claims had already been submitted by reinsurers to arbitration in the second set of arbitration proceedings commenced by them.

38. Having described at great but I fear inevitable length how the parties to this essentially very straightforward reinsurance dispute have reached the present lamentable state of affairs I can I hope deal with the issues which arise in relatively short order.

39. The first question is whether on the true construction of the documents effecting and notifying the appointment of Mr. Berry as arbitrator his appointment was in a reference between Indemnity Marine and London & Scottish and Reinsurers or between Ocean Marine and the Reinsurers. Like the Court of Appeal in the **SEB Trygg Holding** case, 2005 EWCA Civ 1237, as yet unreported, I have been referred to a great deal of authority on this issue much of which is of no direct assistance because directed at problems thrown up either by the expiry of limitation periods or by the rules of court dealing with amendment after the expiry of limitation periods. Moreover the rules of court have changed since many of those cases were decided. The modern approach is that the Court has jurisdiction in such circumstances to allow a new party to be substituted for a party who was named in the Claim Form in mistake for the new party – the new rule CPR 19.5(3)(a), unlike the old RSCO.20r.5(3) says nothing as to the nature or quality of the mistake which must be established.

40. In the present context the enquiry is of course entirely contractual in nature. I am not concerned to apply any rule but only to determine what on ordinary contractual principles may or may not have been achieved. In that regard I should I believe direct myself in accordance with the guidance given in the **SEB Trygg Holding** case. In that case the relevant question was whether or not arbitration proceedings were valid insofar as they were commenced in the name of a party, Old Aachener Re, whose rights and liabilities had been transferred to AMB under the German law of universal statutory succession. Gloster J recorded at para 4 of her judgment, 2005 2 Lloyd's Reports 129 at 133-4: -

"It is common ground between the parties and their German law experts, that the merger between Old Aachener Re and AMB was a transfer, under the German Transformation Statute 1994, by universal succession, of all assets and liabilities of the transferor entity (Old Aachener Re) to the transferee entity (AMB); that such universal succession transferred all assets and obligations in one legal act, by operation of law, with the result that the transferee entity, AMB, became party to all the agreements concluded by Old Aachener Re, the transferor entity, without requiring any participation by the transferor entity's creditors or counter-parties and became responsible for all of Old Aachener Re's liabilities; that all creditors of Old Aachener Re automatically became creditors of AMB as the transferee entity; that upon the merger, Old Aachener Re ceased to exist as a separate corporate entity, without liquidation, with its shareholders ceasing to have any rights in Old Aachener Re and having, in return, corresponding rights in AMB."

It so happens also that, before the arbitration was there commenced, Old Aachener Re was in fact dissolved and ceased to exist as a separate entity.

41. Mr. Reeve is right to point out that the legal process involved in statutory universal succession is not the same as that which occurs under a Part VII transfer, although its practical effect is in my view for present purposes the

same. On the facts of the present case there are at least the following distinctions between the Part VII transfer and the situation which obtained in **SEB Trygg** at the point when the arbitration was commenced: -
i) The transferors remained in existence.
ii) The transferors retained certain residual assets.
iii) The transferors kept certain excluded policies.
iv) The transferors kept certain residual liabilities.
v) The transferors retained certain untransferred outward reinsurances in their favour.

It is also the case that the transferors entered into or it was anticipated that they would enter into an excluded policies reinsurance agreement with Ocean Marine. However it seems to me that none of these points of distinction are of any relevance to the manner in which the question with which I am now concerned was approached by either Gloster J or the Court of Appeal in the **SEB Trygg** case. Gloster J said this, at paragraphs 24-26 and 34 of her judgment, at pages 138-139 and 141: -

"Para 24. The question which arises under this head is, simply stated, what was the identity of the corporate entity which Manches, the solicitors then acting, intended should be a claimant in the arbitration proceedings? Did Manches simply get the name wrong, because they did not know about the merger, or Old Aachener Re's dissolution, or could it be said that their mistake was not merely the use of a wrong name, or a "misnomer", but evinced a more fundamental error, that is to say an intention to bring the proceedings by a wrong claimant, which was no longer in existence. If the case was one of mere "misnomer", then the authorities showed that the position can be corrected by simply amending the name of the parties of the proceedings, which are nonetheless validly constituted; on the other hand, if the intention was in fact to bring the proceedings on behalf of a wrong party, then the proceedings are indeed a nullity.

*Para 25. Thus where proceedings are begun in the name of a non-existent company, they are a nullity and the defect cannot be cured by amending to substitute another company (i.e. a different legal entity) as claimant: **Lazard Brothers v. Midland Bank Ltd** 1933 AC 289. However, the rule is different if the case is one of misnomer. In cases of misnomer, even where the name on the record refers to an entity which no longer exists, the Court can correct the record in the proceedings are correctly constituted ab initio: **The Sardinia Sulcis** 1991 1 Lloyds Report 201 at 205.*

*Para 26. The cases show that the identity of the party intended to be a claimant in an arbitration is to be determined objectively in accordance with the ordinary principles for the construction of a contract, by reference to the notice of arbitration and the surrounding circumstances; see **Unisys International Services Ltd v Eastern Counties Newspapers Ltd** 1991 1 Lloyds Report 538 at 550-551 and 558-562 per Ralph Gibson LJ.*

…

*Para 34. Thus it can be seen that the continental process of universal succession is recognised by the English Courts as being a special case, distinct from the dissolution of an English company and from the assignment of rights, so far as the correct constitution of an arbitration is concerned. Thus, whereas if a company, during the course of an arbitration, assigns away its rights and is dissolved, the arbitration ipso facto lapses because one of the parties has ceased to exist (**Baytur SA v Finagro Holding** SA 1992 QB 610), where a party has ceased to exist by reason of universal succession the arbitration does not lapse and the tribunal is entitled to continue with the reference: **Eurosteel Ltd v Stinnes** AG 2000 1ALL ER 964 at 969."*

42. At paragraph 38 of her judgment Gloster J turned to the facts surrounding the initiation of the arbitration proceedings. Objectively viewed, in her judgment they clearly supported the contention that the mistake was one of misnomer, and not as to the identity of the party which was bringing the claim. The arbitration claimants were the sellers of the shares in Interlife. As the Court of Appeal put it, the arbitration was brought in order to protect the interests of the vendors of Interlife, of which Old Aachener Re had been one, its interest having passed to AMB. The Court of Appeal stated its conclusions in upholding the decision of Gloster J on this point in this way: -

"Misnomer

50. This is the description given to the issue identified at para. 13 (i) above. If the proceedings were started on behalf of a party who did not exist, then they were a nullity. If on the other hand it was clear who the party was, but there was simply an error in naming him, the proceedings were not a nullity and the error can, in appropriate circumstances, be corrected within them. This issue has usually arisen in, and decided authority relates to, litigation in which it is alleged that a named party is incompetent to conduct litigation and that substitution of another party would infringe rules of court as to limitation. The present case differs from the orthodox in two ways. First, it concerns an arbitration, governed by the law of contract and not by rules of court. Second, it is a singular feature of the case that it is the claimant in that arbitration who asserts that the proceedings in which he has taken an active part are a nullity because the claim was brought not in his name but in the name of a non-existent company.

51. We were shown a very great deal of authority on this issue, but much of it was of no direct assistance because it is mainly directed at limitation and at the rules of court. We prefer to state the question as one of principle, namely, who would reasonably have been understood by the party against whom the claim was asserted to be the entity bringing the claim? Within the misnomer cases, that approach is that of Lloyd LJ in **The Sardinia Sulcis** 1991 1 Lloyds Report 201, in particular at page 207, an approach adopted in the most recent case in this court, **Morgan Est v Hanson Concrete Products** 2005 1 WLR 2557. In our case, the proceedings were commenced on the instructions of Mr. Merrifield, acting on the authority of Professor

Hauptmann. But what was the nature of that authority? Plainly, to protect the interests of the vendors of Interlife. Mr. Merrifield had no business to include a claimant in the proceedings, and Professor Hauptmann had no business to permit him to do so, unless that claimant was one of those vendors. The fourth claimant was therefore a claimant as, but only as, one of the vendors.

52. That would have been obvious, to the extent of not even needing thought, to SEB. And it would also have been obvious from a scrutiny of the pleadings, in relation to which we respectfully adopt the observation of Jacob LJ in **Morgan Est** at para 31 of the report of that case that the best source for what the claimant actually intended is to be found in the point of claim. In our case the pleadings unequivocally said that there were brought jointly by the Interlife vendors. In those circumstances the fact that the title of the proceedings did not recall that the relevant vendor had transferred all of its rights to AMB under the Transformation Agreement was indeed was a mere misnomer.

…

54. The approach suggested above marches with that of this court in a case shown to us by Mr. Strauss concerning a landlord's counter-notice, **Lay v Ackerman** 2004 EWCA Civ 184. The notice is valid if it leaves the tenant in no doubt that it comes from the landlord. By the same token, the pleadings in this case could not leave anyone in any possible doubt that they were advanced on behalf of the vendors of Interlife, and of no one else.

55. The arbitral proceedings according were not and are not a nullity. AMB even if not already a party to them joined in them by instructing its solicitors to put its name in the place of the Fourth Claimant."

43. Old Aachener Re had been deliberately listed by Manches as the fourth-named claimant because they had no knowledge of the merger between it and AMB nor of the former's subsequent dissolution.

44. I can discern no distinction of any relevance between the facts of **SEB Trygg** and the present case. The evidence here equally supports the contention that the entity bringing the claim would reasonably have been understood by Harper/Turegum and River Thames to be the party or parties entitled as reinsured or reinsureds to recover under the reinsurance treaty. Requests for payment of claims due to the reinsured under the treaty had been made by those conducting the run-off on their behalf. There were only two reinsureds under the treaty and their claims had at all material times been advanced compendiously, as representing the entire amount due from these reinsurers under the treaty. It was thus of no practical significance whether the claim to recover was pursued in two names or in one. Requests for inspection of records under the relevant treaty had been directed to those same run-off managers. Mr. Berry was appointed under the treaty in respect of claims due thereunder, which, by definition, were claims by the reinsured. Messrs Waltons' letter to reinsurers on 27 May 2005 recited that they had been instructed by Indemnity Marine and London & Scottish to commence arbitration proceedings "against you to collect all balances currently due to them under the Bland Welch Treaty." The reference to Indemnity Marine and London & Scottish was merely misnomer as a result of a mistake as to the continuing entitlement of Indemnity Marine and London & Scottish which misled no one. Reinsurers were left in no doubt that those entitled to collect the claims as reinsureds under the treaty were now resorting to arbitration in pursuit of their claim. Reinsurers sensibly do not assert that they considered the position to be otherwise.

45. Happily my conclusion coincides with the intention of Mr. Hutchings. At paragraph 9 of his second witness statement he says this: - *"On the 25th May 2005 I instructed Waltons & Morse to commence arbitration proceedings against the claimants to recover unpaid balances due from them under the subject treaty. These instructions were carried through when, on 27th May 2005, Waltons & Morse commenced the "Indemnity Marine Arbitrations". In issuing instructions to Waltons & Morse the intention was to pursue recalcitrant reinsurers on behalf of, and for the benefit of, the party or parties properly entitled to receive the unpaid balances from the claimants in this action."*

46. Accordingly, as it seems to me, the error in naming Indemnity Marine and London & Scottish can in appropriate circumstances be corrected within the arbitration proceedings – see the judgment of the Court of Appeal in **SEB Trygg** at para 50. It is appropriate here so to do subject only to questions of authority and prejudice.

47. Before dealing with those further questions I should just indicate that the conclusion which I have reached is, in my view, not simply dictated by the decision of the Court of Appeal in the **SEB Trygg** case but also in line with the earlier decision of the Court of Appeal in **Unisys International Services Ltd v Eastern Counties Newspapers Ltd,** to which I have already referred. There too the notice of arbitration was deliberately issued on behalf of the wrong company because of a failure of communication – the Court of Appeal held that properly construed the appointment was on behalf of the company now entitled to assert the rights of the buyers under the contract of sale which there was in dispute. Ralph Gibson LJ found it "impossible to contemplate that the law could justify any other answer." I would respectfully apply that sentiment to the facts of the present case. The arbitrator himself put it pithily when he said that the issue is one of form rather than substance. It does not appear from the judgment in **SEB Trygg** case that the decision of the Court of Appeal in **Internaut Shipping Gmbh v Fercometal SA RL** 2003 2 Lloyds Report 430 was cited to the Court of Appeal although Mr. Phillips for the reinsureds asserts that it was. However in my judgment nothing in that earlier judgment of the Court of Appeal should lead me to adopt an approach to this question different from that adopted by the Court of Appeal in **SEB Trygg. Internaut** was a wholly different case. It was unclear on both sides of the transaction which of two wholly unconnected companies had contracted as owner. A positive election was made to pursue the arbitration in the name of one of the two possible candidates, whose entitlement to sue was thereafter admitted by the respondents in the arbitration. Rix LJ regarded the case as raising different considerations from the more familiar case where a notice is treated

consensually as identifying, albeit by a wrong description, the party to a contract. I note that the outcome was not in the event that the arbitration was in its origin a nullity.

48. Turning to the question of authority, Mr. Hutchings at paragraph 12 of his first witness statement says this: - *"When I instructed Waltons & Morse to commence the arbitration proceedings against the defendants in the names of Indemnity Marine and London & Scottish, I consider that Waltons & Morse were implicitly, if not expressly, thereby given authority to pursue those arbitrations equally on behalf of Ocean Marine. The benefit of the treaty had, however, without my knowledge, passed Ocean Marine. Resolute was responsible for the administration of the books of business of all three companies and I was their properly delegated representative with authority to instruct solicitors. If, however, the court disagrees with me, I make clear that I nevertheless ratified all actions which have been taken by Waltons & Morse on behalf of Ocean Marine when, on 13 September 2005, I confirmed to Waltons & Morse that they were instructed to act on behalf of Ocean Marine in connection with what had conveniently been termed the Indemnity Marine Arbitrations (and of course to take whatever action was considered appropriate in relation to the Ocean Marine Arbitrations)."*

49. In his second witness statement Mr. Hutchings also says this: -

"10. Resolute's authority extends to commencing legal proceedings on behalf of Ocean Marine as much as to commencing proceedings on behalf of Indemnity Marine or London & Scottish. …

11. Because the claimants in Clyde & Co have persisted in their unfounded allegations that resolute does not have authority to bind Ocean Marine in the commencement and pursuit in legal proceedings, the board of directors of Ocean Marine was asked to convene a special meeting for the sole purpose of passing a resolution ratifying the actions of Waltons & Morse taken in their name or alternatively confirming resolute's ratification of those acts on behalf of the company."

50. Mr. Hutchings then produces a copy of the minutes recording that resolution which, as he points out, is signed by each of the three directors of Ocean Marine and has been certified by the company secretary. That minute records: -

"IT IS RESOLVED:

That insofar as it is for the Company to do so, then it ratifies, alternatively it confirms the ratification of, Waltons & Morse's actions among other things in:

- *Commencing arbitration proceedings on behalf of the Company on 27 May 2005 against Harper Insurance Limited ("Harper") and River Thames Insurance Company Limited ("River Thames");/or*
- *Applying to the arbitral tribunal for an order substituting the name of the Company as claimant in place of Indemnity Marine and London & Scottish;*
- *Acting on behalf of the Company in all respects in relation to the pursuit of claims for unpaid treaty balances against and River Thames (sic), including the progression of the arbitral proceedings referred to above."*

51. In the light of that evidence Messrs Waltons & Morse in my judgment had authority to act for Ocean Marine from the outset. If that is wrong, their actions have been ratified. Mr. Reeves suggests that ratification should not be regarded as possible where it will cause unfair prejudice as for example by divesting a party of accrued rights – see generally Bowstead & Reynolds on Agency, 17th Edition, Article 19. The rights of which it is said it would on this hypothesis be unfair to deprive reinsurers is the right to appoint an arbitrator and the right to pursue the two arbitrations which they have subsequently begun. The right to appoint an arbitrator is a right which the reinsurers enjoyed and which they have lost through their own decision, notwithstanding their time for appointment was twice extended and notwithstanding it was explained to them how they could appoint without prejudice to their contention that there was no arbitration agreement. Reliance upon the right to pursue reinsurers' own arbitrations is a purely circular argument. In any event I cannot conclude that the ability to insist upon a three man tribunal is in the circumstances a right of which it would be unfair to deprive reinsurers. The real question at issue in this arbitration is whether certain risks could properly be ceded under the treaty and the arbitration clause calls for the contract to be interpreted as an honourable engagement. This is pre-eminently a dispute to be decided by a market tribunal. It is a dispute to which a lawyer could contribute little without guidance from those with experience in the market. It is not suggested that Mr. Berry lacks the relevant experience and expertise and he is pre-eminently qualified to determine the dispute. It is rightly not suggested that his ability to deal fairly with the dispute will be in any way compromised by the circumstance that he was initially the appointee of the reinsureds.

52. In the light of my conclusions thus far Mr. Berry was in my judgment fully entitled to allow the substitution of Ocean Marine as Claimant in the arbitration of which he was seised and he was correct so to do. Whether in the light of Section 46 of the Arbitration Act 1996 and the honourable engagement clause his conclusion can in fact be challenged is not a question which I have to decide. In my judgment the challenge to his decision fails, as does the challenge to his earlier decision that he had substantive jurisdiction in the dispute and that the arbitration tribunal was properly constituted.

53. The final question is whether the claims contained in the Treaty Statements submitted to reinsurers on 1 September 2005, i.e. after Mr. Berry's appointment, can probably be pursued in that reference. Mr. Berry's appointment was said to be in a reference commenced "to recover all sums currently due and owing to our clients." The notice of that appointment given to reinsurers spoke of the purpose of the arbitration as being to collect all balances

currently due under the Bland Welch Treaty. In my judgment the appropriate construction to be given to those words in the context in which they were used is that the reference was intended to embrace all balances which should arise under the treaty during the currency of the arbitration. The consequences of not construing the reference to arbitration in that way would be absurd. In this and similar cases there would be a need to constitute a fresh tribunal every time further statements were drawn up and there would be the opportunity for the parties by judicious tribunal-shopping to obtain from one tribunal a decision which might in whole or in part pre-empt the decision of another. I cannot believe that any commercial parties would ordinarily wish to achieve such an absurd result. In my judgment when Mr. Berry was appointed, and when ultimately he was accepted to be properly appointed and to have jurisdiction, he was regarded by the parties as having been appointed to deal with the entitlement of the reinsureds to recover such claims as had already been intimated and all such further claims as should arise during the currency of the arbitration thus begun. In dealing with such claims it is axiomatic that he has jurisdiction to consider all such defences as the reinsurers may properly advance. Likewise, he has jurisdiction to consider assertions by the reinsurers of a contractual or other right to inspect records and, which may be the same thing, to consider requests for production of documents. It follows in my view that the arbitrator was justified in his ruling on 26 October 2005 that he would permit an amendment to the Points of Claim to include claims for the unpaid treaty balances covering the 6 month period to 30 June 2005. Whether it is appropriate or permissible at this stage of the arbitration to challenge that ruling is again something which I perhaps do not need to decide. Insofar as the challenge is mounted on the basis that the width of the reference to arbitration is insufficient to encompass claims arising subsequent to the arbitrator's appointment it must in my judgment fail, and it is no doubt convenient that the point should be decided now.

54. I shall hear Counsel on the form of Order required to give effect to my judgment. It is a matter of great regret to me that the inevitable delay to the progress of this arbitration caused by the bringing of these proceedings, which was first exacerbated by insufficient time being allowed for the hearing, has now been yet further exacerbated by my own judicial commitments which have prevented my giving judgment before now. I hope that the parties will henceforth cooperate in allowing the arbitration to proceed with all due dispatch.

Matthew Reeve (instructed by Messrs Clyde & Co) for the Claimants
S. J. Phillips (instructed by Messrs Waltons & Morse) for the Defendants