Neutral Citation Number: [2007] EWHC 503 (Comm)

Case No: 2006 FOLIO 1239

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2007

Before:

MR JUSTICE CRESSWELL

- -

Between:

HALIFAX LIFE LIMITED	**Claimant**
- and -	
THE EQUITABLE LIFE ASSURANCE SOCIETY	**Defendant**

- -
- -

Christopher Symons QC, Clive Freedman and Mark Humphries Solicitor-Advocate
(instructed by **Linklaters**) for the Claimant
Christopher Butcher QC and Alexander Macdonald (instructed by Lovells) for the Defendant

Hearing dates:

- -

Judgment

Mr. Justice Cresswell :

The claim

1. By its CPR Part 8 claim form the claimant seeks:

   (1) a declaration that the expert determination by Mr N H Taylor ("the Umpire") made by way of a written decision dated 21 September 2006 is not final and binding on the parties, on the grounds that:

   i) the decision is not a decision reached in accordance with the agreement between the parties dated 1 March 2001 ("the Agreement" or "the Reassurance Agreement"), as a result of the Umpire having materially departed from the agreed terms of reference by failing to provide any adequate reasons for his decision; and/or

   ii) the decision contains a manifest error as explained in the witness statement of Mark Humphries;

   (2) directions as to how the dispute between the parties should be resolved.

2. The defendant says that there is no basis for granting the declaration sought.

Statement of Facts

The parties have helpfully agreed the following statement of facts to which I have made additions drawn from documents and other minor additions.

3. Following the decision of the House of Lords in Equitable Life Assurance Society –v- Hyman [2002] 1 AC 408; [2000] UKHL 39 in July 2000, The Equitable Life Assurance Society ("ELAS"), the defendant, announced that it was putting itself up for sale. The sale process failed, and in late 2000 ELAS closed to new business. Following discussions between ELAS and Halifax Life Limited ("Halifax Life"), the claimant, an agreement dated 1 March 2001 was reached whereby Halifax Life agreed to reassure ELAS' unit-linked and non-profit business, excluding immediate annuity business.

4. The size of the reassured business was approximately £4 billion of unit reserves and approximately £0.3 billion of non-unit reserves. This case is only concerned with the £0.3 billion of non-unit reserves. The main products involved were personal pensions, group pensions, individual pensions, retirement annuities, life single premium bonds, non-profit deferred annuities and temporary (term) assurances.

5. Pursuant to clause 3 of the Agreement Halifax Life agreed to reassure the liabilities of ELAS in respect of all "Covered Payments" as defined therein [2/1/1/2-038]. Pursuant to clause 4.2 of the Agreement [2/1/1/2-038] ELAS agreed to pay Halifax Life, as part of the consideration for the Agreement, an "Initial Premium" (as defined in the Agreement). The procedure for determining the Initial Premium payable by ELAS to Halifax Life is set out in clause 4 of and Schedule 2 to the Agreement.

6. Clauses 4.2.2 and 4.3 of the Agreement read as follows:

> "4. Initial Premium
>
> …
>
> 4.2 Immediately following the Effective Date:
>
> …
>
> 4.2.2 [ELAS] shall transfer to Halifax Life securities (which shall include units in external units trusts and any shares held by [ELAS] in any open-ended investment company) and cash matched in type, currency and term selected by the appointed actuary of [ELAS] on the advice of the appointed actuary of Halifax Life with a value calculated in accordance with Part VIII of the Insurance Companies Regulations 1994 (taking account of Regulation 57 of such Regulations as it applies to Halifax Life at the Effective Date) equal to the mathematical reserves (including any sterling reserves) (such reserves to be determined using bases as at the Effective Date no weaker (relative to the underlying conditions) than those used by the appointed actuary of [ELAS] at 31 December 2000 and 31 December 1999) as at the Effective Date in respect of liabilities

> for Covered Payments for Covered Policies other than the Unit Liabilities;
>
> 4.3 The securities and cash to be transferred pursuant to Clause 4.2.2 shall be determined upon the estimate of the appointed actuary of [ELAS] (on the advice of the appointed actuary of Halifax Life) of the type, currency and term of such securities and cash which will best satisfy the requirements of that Clause 4.2.2. Immediately following the Effective Date, the appointed actuary of [ELAS] shall determine precisely the assets which should have been allocated pursuant to Clause 4.2.2. Such determination shall be binding on both parties if agreed by the appointed actuary of [ELAS] and the appointed actuary of Halifax Life or, in default of agreement, on the determination of the Umpire in accordance with the procedure set out in Schedule 2. There shall be an adjustment (if necessary) to the securities and cash transferred pursuant to Clause 4.2.2 so that the securities and cash transferred by [ELAS] are such securities and cash as would have been transferred by [ELAS] had the determination pursuant to this Clause been done at the time of the transfer made under Clause 4.2.2. Any adjustment required shall be effected as soon as possible (and in any event within 21 days of the date of agreement by the appointed actuary of [ELAS] and the appointed actuary of Halifax Life or, if relevant, the date of determination by the Umpire) by a transfer of securities and cash (as agreed or determined) by [ELAS] to Halifax Life or by Halifax Life to [ELAS] (as the case may be)."

7. Clause 4 of the Agreement envisages a three stage process for calculating the Initial Premium, as follows:

> (a) the appointed actuary of ELAS was required to estimate (on the advice of the appointed actuary of Halifax Life) the type, currency and term of such securities and cash which would best satisfy the requirements of clause 4.2.2;
>
> (b) the securities and cash so estimated would be transferred to Halifax Life; and
>
> (c) immediately following 1 March 2001 (the date of the Agreement), the appointed actuary of ELAS was to determine precisely the assets which should have been allocated pursuant to clause 4.2.2.

Any necessary balancing payment would then be made.

8. The determination in stage (c) above was to be binding on both parties if agreed by the appointed actuary of ELAS and the appointed actuary of Halifax Life. In default of agreement, a binding determination was to be made by the Umpire in accordance with the procedure set out in Schedule 2 to the Agreement.

9. Stages (a) and (b) above were followed. An interim estimate of the Initial Premium was made in the sum of £327.065 million in February 2001. In fact, the amount actually transferred to Halifax Life on 1 March 2001 was £331.844 million.

10. In due course there followed discussions between the parties with a view to reaching agreement on the amount which should be determined in stage (c). Deloitte & Touche LLP ("Deloitte") prepared a report dated 16 May 2003 in which they reviewed whether the Initial Premium payment was adequate and met the requirements of the Agreement. Deloitte determined that ELAS had overpaid the Initial Premium by £4 million. Halifax Life were supplied with a copy of that report. Halifax Life asked KPMG LLP ("KPMG") to assist them. Although a number of meetings were held between the actuaries assisting the parties, this did not result in the determination required in stage (c) being made. Halifax Life asked ELAS to provide certain information and documents, pursuant to clause 10.1 of the Agreement, by letter dated 1 June 2004 (the "Information Request"). ELAS declined to provide this information in its letter dated 14 June 2004. ELAS stated that the request did not fall within the ambit of clause 10.1 of the Agreement, would delay the expert determination process, and was unnecessary.

11. The amount of the adjustment to be made to the payment of £331.844 million became the subject of the dispute which was referred to the Umpire in 2004, pursuant to clause 4.3 of the Agreement. The Umpire's terms of reference for the expert determination (the "Terms of Reference") were agreed by the parties shortly thereafter, in or around October 2004. It was agreed that the Umpire would act as expert, not as arbitrator (paragraph 5). It was also agreed that the decision would be binding on the parties save for manifest error, and that the Umpire would include with the decision reasons for the decision (paragraph 10).

The Terms of Reference provided as follows: -

> "It is agreed that:
>
> 1. By consent of the Parties, the Umpire has been appointed to resolve by way of Expert Determination the issues set out in clause 2 below.
>
> 2. The issues to be determined by the Umpire are:
>
> (a) What amount, (if any) is payable by either Party to the other Party in respect of the initial premium payable as at the Effective Date under clause 4.2.2 of the Reassurance Agreement, by way of adjusting payment, as set out in clause 4.3 of the Reassurance Agreement; and
>
> (b) whether interest would be payable in respect of any such adjusting payment and if so and if an adjusting payment is required, what amount of interest is payable.
>
> (the "Issues").

3. The Parties and the Umpire agree that the Issues will be resolved in accordance with the provisions of the Reassurance Agreement and these Terms of Reference (save for any express written agreement between the Parties to the contrary). In accordance with paragraph 2.1 to Schedule 2 to the Reassurance Agreement, the Parties shall each (a) use all reasonable endeavours to co-operate with the Umpire in resolving the dispute which has arisen by means of the Expert Determination and (b) for that purpose shall provide to him all such information and documentation as he may reasonably require. Accordingly (and without limitation), each Party shall make available to be questioned by the Umpire any officer, employee, agent or adviser of that Party whom the Umpire may consider to be able to supply information of relevance to the determination of the Issues.

4. In rendering a decision on the Issues the Umpire is entitled to consider only the matters in dispute and is entitled only to take into account such evidence and information as the Parties have put before him or the Parties have provided to him at his request or in response to any enquiry carried out by him (as the case may be). In accordance with clause 14 of the Reassurance Agreement, the Umpire shall reach his decision not only be reference to the express terms of the Reassurance Agreement but also by reference to the original intentions of the Parties as reasonably ascertainable from the recitals and other terms of the Reassurance Agreement and from such other evidence as the Umpire in his sole discretion determines to be appropriate.

5. The Umpire will act as an expert and not as an arbitrator.

6. The Umpire agrees to keep confidential all matters raised with and documentation supplied to him. …

7. The Umpire is independent of the Parties, is neutral and impartial, and does not act as an adviser to the Parties.

8. The Umpire has the right to seek professional assistance and advice as he may require in order to fulfil his duties under these Terms of Reference. Before doing so, the Umpire shall inform the Parties of his intention to seek such assistance and shall seek the prior approval of the Parties to the cost of so doing.

9. The Expert Determination process will be conducted in accordance with such directions as may be agreed by the Parties and the Umpire. In making directions, the Umpire will seek to agree such directions with the Parties. If they cannot be agreed, in a reasonable time as decided by the Umpire, his directions will prevail.

> 10. The Expert Determination will lead to a written decision ("the Decision") being issued by the Umpire to the Parties. Save for manifest error, the Decision will be final and binding on the Parties. The Umpire will include, with the Decision, reasons for the Decision.
>
> 11. The Parties seek to have the Expert Determination concluded and a Decision issued by the Umpire by no later than 31 March 2005. Accordingly, the Parties will co-operate with each other and with the Umpire with a view to the Expert Determination being concluded and a Decision issued by the date referred to.
>
> 12. Neither of the Parties will call the Umpire as a witness, consultant, arbitrator or expert in any litigation or arbitration in relation to the Issues and he will not voluntarily act in any such capacity without the written agreement of all Parties. Save in respect of any fraud committed by the Umpire, neither of the Parties shall seek to recover damages from the Umpire or pursue any other claim against the Umpire on the ground of any alleged negligence on his part in carrying out his duties under these Terms of Reference."

12. On 23 September 2004 Linklaters, on behalf of Halifax Life, sent a letter to Lovells, on behalf of ELAS, and to the Umpire enclosing a copy of Halifax Life's outline submissions for the first directions hearing with the Umpire to be held on 27 September 2004.

13. ELAS served a response to Halifax Life's outline submissions on 24 September 2004.

14. Following the first directions hearing held on 27 September 2004 the Umpire ordered on 30 September 2004 that ELAS should submit its full determination of the Initial Premium to Halifax Life by 15 October 2004 with details of which of the documents and information requested by Halifax Life in its Information Request had been disclosed and which documents or information were still outstanding. He directed that if after provision of ELAS' determination there remained disagreement as to disclosure of information, he would hold a further directions hearing on 10 November 2004 to determine that issue or give directions for its determination.

15. On 15 October 2004 Lovells sent a letter to the Umpire enclosing ELAS' Submission, a Core Bundle of background documents relevant to the dispute, a Calculation Bundle containing information and explanations summarised in the submission and an annotated version of the Information Request. ELAS' determination was that the reserves at 1 March 2001 amounted to £331.302 million and that Halifax Life had been overpaid by £0.542 million.

16. The annotated response to Halifax Life's Information Request dealt with each category of information requested by Halifax Life. ELAS identified information that had already been provided or was otherwise available to Halifax Life, information that ELAS would provide to Halifax Life, and where it would not provide information, including because it would be irrelevant to do so or for other reasons.

17. On 4 November 2004 Linklaters sent a fax to Lovells, copied to the Umpire, setting out (inter alia) comments from Halifax Life on the ELAS calculation bundle. These included points relating to term mortality reserves, investment costs reserves and liabilities for deferred annuities. ELAS responded to this letter on 23 November 2004, setting out its contentions as to the proper approach under clause 4.2.2 of the Agreement, and dealing with the particular concerns raised by Halifax Life in its 4 November 2004 letter (and also its 9 November 2004 letter).

18. On 10 November 2004 the parties attended a second directions hearing. The Umpire directed that there should be a meeting between actuaries, in the Umpire's presence, and that if necessary a further directions hearing to deal with the Information Request should be held.

19. On 3 December 2004, a meeting with the Umpire and Mr Wright of Deloitte (the actuary representing ELAS), Mr Myers, the appointed actuary for Halifax Life, was held.

20. By letter of 11 January 2005 Mr Wright of Deloitte produced the information and electronic documents to the Umpire and Mr Myers that was agreed at the 3 December 2004 meeting he would provide. Three categories of information were provided, concerning (1) the results of calculations providing a trail of all of the significant results in the submission, (2) "backing information" for the non-economic assumptions, including assumptions for mortality and expenses and also relating to non-profit deferred annuities and (3) detailed information relating to the formulae and calculations in the computer programs that produced the results.

21. A further meeting was held between the actuaries and the Umpire on 31 January 2005.

22. On 7 February 2005 a third directions hearing was held. Following submissions from the parties' respective counsel, the Umpire resolved that, subject to the parties' consent under paragraph 8 of the Terms of Reference, the Umpire should obtain an opinion from leading counsel to assist him in resolving how clause 4 of the Agreement should be interpreted.

23. The parties submitted their arguments to be placed before leading counsel, ELAS on 17 March 2005 and Halifax Life on 18 March 2005.

24. There was a further exchange of correspondence between Linklaters and Lovells dated 18 and 24 March 2005 respectively.

25. On 8 July 2005 the Umpire made a ruling on the relevance of certain reports which had been shown to him by ELAS. He set out his decision. This arose out of Halifax Life's request at the third directions hearing that it be shown ELAS' "Appointed Actuary's Report for the year 2000". ELAS sent the Umpire four Appointed Actuary Reports. The Umpire determined that the reports contained nothing relevant to the dispute, and he referred to the fact that he had not yet ruled on Halifax Life's general request for disclosure.

26. On 23 November 2005 Edwin Coe (solicitors appointed by the Umpire and who provided legal advice to the Umpire throughout) sent a letter to the parties attaching a

copy of Mr Hildyard QC's opinion regarding the interpretation of clause 4.2.2 of the Agreement [2/2/34/2-554]. The letter stated that the Umpire accepted Mr Hildyard QC's advice. I refer to the advice for its full terms and effect.

27. Mr Hildyard's opinion included the following:-

> "As it seems to me:
>
> …
>
> (6) despite Halifax's suggestion to the contrary, there is no real dispute between the parties that insofar as Equitable's own previous calculation bases had resulted in mathematical reserves for any product line being calculated over-cautiously (so as to yield a reserve higher than likely to be necessary) Halifax are entitled to the benefit;
>
> (7) by contrast, and subject to sub-paragraph (10) below, there is no warrant in the Reassurance Agreement or its context for Halifax to insist on Equitable adopting a stronger basis or bases of calculation relative to the underlying conditions than those actually used by Equitable in the two previous years;
>
> (8) put another way, there is no warrant (subject to sub-paragraph (10) below) for reading the Reassurance Agreement as requiring the strengthening of any reserves on the grounds that they were too low in 1999 or 2000; and thus
>
> (9) in respect of the calculation of the premium, in my view (but subject again to sub-paragraph (10) below) Halifax is not entitled to insist on any stronger bases of reserving (relative to underlying conditions in 2001) than those adopted by Equitable in 1999 or 2000 (relative to underlying conditions then);
>
> (10) however, any determination of mathematical reserves requires a margin of prudence, and if the reserves for any line of business were to be lower than the standard implicit in the regulations, professional guidance or best practice, then they should be augmented.
>
> 20. Moving from that to the meaning of the particular words in issue, in my opinion:
>
> (1) "valuation bases" means the bases (particularly as regards rates of interest and investment return, mortality or morbidity assumptions and expense assumptions) actually adopted to determine the value of sums assured or annuities per annum (including vested reversionary bonuses) for each line of business in Equitable's returns to the FSA for the

financial years ended 31 December 2000 and 31 December 1999; and

(2) "underlying conditions" means economic factors affecting insurance companies generally, including

(a) interest rates and investment returns

(b) expected future inflation

(c) expected return on equities and other assets;

(3) the "bases used by the appointed actuary of Equitable at 31 December 2000 and 31 December 1999" means the valuation bases in fact used by Equitable's appointed actuary for each line of business within the definition of Covered Policies identified in making Equitable's returns to the FSA for the financial years ended 31 December 2000 and 31 December 1999;

(4) the requirement that the bases used should be "no weaker (relative to the underlying conditions)" connotes that for the purposes of determining mathematical reserves as at the Effective Date the valuation bases for each line of business considered as a whole should be no weaker relative to underlying conditions as at that date than were the valuation bases adopted in 1999 and 2000 for each such line of business relative to the underlying conditions at those dates;

(5) in other words, the rates of interest to be assumed and the mortality or morbidity tables to be adopted should not be weaker relative to underlying conditions than were the assumed rates of interest and mortality or morbidity tables adopted in 1999 and 2000 relative to the underlying conditions as at those dates;

(6) the intention was that the calculation of mathematical reserves as at 1 March 2001 for the purpose of finally determining the premium due to Halifax under the Reassurance Agreement should be on bases at least as strong relative to the underlying conditions of 1 March 2001 as were the reserves made as at 31 December 2000 and 31 December 1999 relative to the underlying conditions as at those dates;

(7) if stronger bases relative to the underlying conditions as at that date were taken in 1999 than in 2000, then those stronger bases constitute the benchmarks against which to test bases in 2001, and vice-versa.

> 21. It has been suggested on behalf of Halifax that the appointed actuary of Equitable has, in making his determination of mathematical reserves, incorrectly sought to adopt "one single unspecified and unexplained basis" to calculate mathematical reserves, rather than different bases according to the nature and/or category of the business concerned. This suggestion is elaborated in Halifax's reply. I agree with Halifax that the "bases" referred to in the phrase "using bases no weaker (relative to the underlying conditions) than those used by the appointed actuary of Equitable at 31 December 1999 and 31 December 2000" are the specific bases in fact used to calculate mathematical reserves for those periods as set out in Equitable's regulatory returns.
>
> 22. That brings me to the question as to who is now to carry out the determination required by clause 4.3, given the disagreement between the parties, and what should be that person's approach.
>
> 23. In my opinion, in the light of the fact that Halifax must be taken to have declined to agree the determination made by the appointed actuary, that task now falls to the Umpire.
>
> 24. The Reassurance Agreement does not expressly state how the Umpire is to make the required determination; nor does Schedule 2 (which really goes to procedural issues as to the Umpire's appointment) offer any help in this regard.
>
> 25. However, as it seems to me the inference is that the Umpire is required to make the determination using bases that may readily be compared with and which he is satisfied are no weaker (relative to the underlying conditions) than the bases in fact adopted by Equitable in 1999 and 2000, and result in reserves no less than such as would be required by regulation or professional obligation. It is thus for the Umpire to consider and determine what bases should be adopted in order to meet that objective; and it is likewise for the Umpire to determine what information he requires for that purpose."

28. On 28 November 2005 a fourth directions hearing was held in which the Umpire confirmed that he unreservedly accepted the opinion of Mr Hildyard QC and outlined the process to be followed by the parties going forward:

    i) The Umpire would ask Mr Myers to confirm briefly and succinctly the particular concerns he wished the Umpire to address for investigation in his proposed determination.

    ii) Thereafter he would have discussions with Mr Myers in order to clarify any issues in his own mind before (iii) below.

    iii) He would attend upon Deloitte, on behalf of ELAS, in order to go through their own workings in detail, particularly in the context of the issues raised by Mr Myers on behalf of Halifax Life.

iv) He would then make his determination, unless it transpired that he needed more submissions from either side. In his written ruling following the hearing he recorded that he proposed to circulate his draft determination for comment and observation by the parties before he finally made his determination.

29. As planned, following the hearing the Umpire had a private meeting with Mr Myers during which Mr Myers provided the Umpire with a handwritten note identifying the four areas of concern to which he wished the Umpire to direct his attention at his next meeting with Mr Wright. These concerns were then summarised in paragraph 5 of the Umpire's directions issued following the directions hearing: -

> "5. Following the Directions hearing at which all parties were present, I adjourned into a private meeting with Mr Richard Myers representing Halifax. Mr Myers confirmed that he has the following four basic areas of concern upon which he wishes me to address my attentions when attending upon Deloitte;
>
> i. In relation to Deferred Annuity Business,
>
> a) incomplete data, particularly re. escalation and widows annuities,
>
> b) expense assumptions,
>
> c) investment assumptions.
>
> ii. In relation to Term Assurance Business the mortality assumptions .
>
> iii. In relation to Unit Linked Investment Products,
>
> a) the basic expense level should be increased,
>
> b) the investment charge assumptions should be higher,
>
> c) there is a differing approach between 1999 and 2000 for repeated single premiums – 1999 was single premiums, 2000 was ongoing single premiums.
>
> iv. In relation to two miscellaneous points, I am asked to consider;
>
> a) the cut-off for group pensions business,
>
> b) the initial charges rebate mechanism operated by ELAS."

30. Following that meeting, and as agreed at it, on 2 December 2005 Mr Myers provided the Umpire with the report of Mr Nicholas Dexter of KPMG.

31. The Umpire then held a series of private meetings with ELAS' actuaries, as envisaged in the directions order. These took place on 6 December 2005, 14 December 2005, 6 January 2006 and 11 April 2006. Halifax did not object to this procedure.

32. On 1 March 2006 a further meeting was held between Mr Myers and the Umpire. On 7 March 2006, Mr Myers sent an email to the Umpire concerning the matters discussed during this meeting, and setting out various comments on the spreadsheet which the Umpire had shown him.

33. On 5 July 2006 Edwin Coe sent a letter to the parties enclosing the Umpire's draft determination, inviting observations and submissions as to interest and costs. The Umpire's draft determination determined that £14.612 million should be paid by ELAS to Halifax Life. The Umpire stated that he accepted in principle ELAS' calculations as to the level of reserves actually held by ELAS at 1 March 2001. He stated that Mr Hildyard QC's Opinion at paragraph 20(1) led him to choose the higher of the 1999 Final and 2000 Final columns on the spreadsheet which ELAS had provided. This spreadsheet, showing the Umpire's determination as to the value of ELAS' reserves for each line of business, was attached as an Appendix to the draft determination.

34. On 24 July 2006 Linklaters sent a letter to Edwin Coe, copied to the Umpire, providing Halifax Life's comments and observations in relation to the Umpire's draft determination and its submissions on interest and costs. Linklaters stated that the Umpire had failed to set out reasons in accordance with clause 10 of the Terms of Reference. Linklaters asked the Umpire to provide further reasons and reserved the right to comment further on the draft determination once further reasons had been provided to enable Halifax Life to understand the Umpire's decision.

35. Lovells wrote to Edwin Coe on 28 July 2006 setting out submissions on interest and costs. Lovells stated that it had no other observations or proposals relating to the draft determination.

36. On 22 September 2006 Edwin Coe sent a letter to the parties enclosing the Umpire's final determination and the appendix thereto ("the Decision"). The Umpire had made amendments to the determination to provide further explanation, and to reflect comments made about the appendix. The amount of the determination was unchanged.

37. The Umpire's determination and findings were as follows: -

> "5. My Determination and Findings
>
> I was provided with a spreadsheet setting out the results of Equitable's valuations as detailed in their Calculation Bundle of 15 October 2004. This is attached as an Appendix hereto. A number of columns have been hidden on this copy in order to make the document easier to follow but these can be "unhidden" on an Excel version of this appendix. In the right hand column are my conclusions. The reasons for the conclusions are as follows:
>
> (i) As set out at 4. (ii) above 1 have unreservedly accepted Mr Hildyard's Opinion. That Opinion, at paragraph 19(8) was that, subject to paragraph 19(10) (which I shall deal with at 5(iii) below) "there is no warrant for reading the

Reassurance Agreement as requiring the strengthening of any reserves on the grounds that they were too low in 1999 or 2000 ". In these circumstances I have accepted that Halifax bought the ELAS reinsurance business on the basis of the reserves actually set, whether or not they were correctly set given the various arguments which have arisen over them. Thereafter, that is to say on the basis of how they were actually set, any question of adjustment arises.

(ii) Mr Robert Hildyard's Opinion at paragraph 20(1) leads me to choose the higher of the 1999 Final and 2000 Final columns of the Appendix. I have considered these by product line/line of business.

(iii) Mr Hildyard's Opinion at paragraph 19(10) advises me that I must ensure that if the reserves for any line of business were to be lower than the standard implicit in the regulations, professional guidance or best practice they should be augmented. That has led me to choose the 2001 Final figures where these are in excess of the 1999 Final and 2000 Final figures. This is because I am satisfied that the 2001 final figures were based on a fully compliant valuation, whereas Mr Derek Wright on behalf of ELAS has accepted that the 1999 and 2000 figures may not have been so compliant. By "fully compliant" I mean that they were compliant with the standard implicit in all relevant regulations, professional guidance or best practice. In deciding upon the figures 1 gave full consideration to all the underlying bases and assumptions used by ELAS and I accepted them. These underlying bases and assumptions gave rise to mathematical reserves set out in the Appendix.

In reaching the above conclusions I have carefully considered all the statements made in the Calculations Bundle and all submissions made to me in my various meetings with the Actuaries concerned, in order fully to understand how the various sets of Final figures were calculated.

6. Result

Accordingly, my Determination is that the amount exclusive of interest payable by Equitable to Halifax is £14.612m which is £346.456m minus £331.844m, the amount actually paid."

Halifax Life's submissions

Mr Symons QC for Halifax Life submitted as follows: -

38. The Decision is not binding on the parties since:

> (1) The Umpire failed to provide reasons which explained why he rejected Halifax Life's principal contentions.
>
> (2) The Umpire failed to provide reasons which explained what he had learnt from his private meetings with ELAS representatives, what documents he had been shown and how this information influenced him in deciding how to deal with the concerns expressed by Halifax Life.
>
> (3) The Umpire thereby materially departed from his instructions and/or his Decision contained a manifest error.

39. Halifax Life seeks:

> (1) a declaration that the Decision of the Umpire dated 21 September is not binding, and
>
> (2) a direction that a determination should be made by a new Umpire appointed in accordance with clause 4 and Schedule 2 of the Agreement.

40. Halifax Life's principal contentions were set out at the commencement of the expert determination. Halifax Life's case was that the premium passed to them was too low by a substantial amount. The main arguments advanced which challenged ELAS' successive calculations included the following points:

> (1) With regard to term assurance, the critical assumption made by ELAS related to mortality rates. Halifax Life challenged those rates and the interest rates assumed for discounting compared with those shown in regulatory returns in 1999 and 2000.
>
> (2) With regard to investment costs paid by ELAS in respect of reserves for unit-linked policies, Halifax Life was of the opinion that the reserves included in ELAS' 15 October 2004 calculation bundle were inadequate, and that ELAS held supplementary reserves in 1999 and 2000 which had not been included in ELAS' calculations, to cover these costs.
>
> (3) With regard to deferred annuity obligations of ELAS, Halifax Life was of the opinion that the reserves included in ELAS' 15 October 2004 calculation bundle in relation to widows' benefits and escalation were inadequate, arguing that they were too low compared to figures which had been provided by ELAS previously on 17 December 2001, and that ELAS held supplementary reserves in 1999 and 2000 which had not been included in ELAS' calculations to cover these obligations.

41. Each of these points had the potential to have a very substantial effect on the calculation of the amount of the Initial Premium and of any adjustment which might be required.

42. The express or implied terms of the relevant agreement determine whether the outcome of the procedure is a decision which has been made in accordance with the contract and which is binding on the parties. Those terms determine how the expert determination should be conducted. Broadly:

> (1) Putting on one side cases of fraud, collusion or partiality (which are not relevant to the present dispute), the principal ground on which a party to an expert determination may succeed in a challenge to the determination is that the expert has materially departed from his instructions, so that the determination is not a determination made in accordance with the terms of the contract: per Dillon LJ in Jones v Sherwood Services Limited plc [1992] 1 WLR 277 at 287.
>
> (2) In the absence of terms of the contract which provide otherwise (such as "save for manifest error"), an expert determination cannot be challenged on the ground that the decision was mistaken, so long as the expert has answered the right question and has not otherwise materially departed from his instructions: per Knox J in Nikko Hotels v MEPC [1991] 2 EGLR 103 at 108B.
>
> (3) The test for deciding whether an expert has materially departed from his instructions was considered in Veba Oil Supply & Trading GmbH v Petrotrade Inc [2001] EWCA Civ 1832, [2002] 1 Lloyd's Rep 295. Simon Brown LJ.

43. Where a contract provides that the decision of the expert is binding save for "manifest error", the expression "manifest error" refers to "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion" (see Veba Oil Supply & Trading GmbH v Petrotrade Inc [2001] EWCA Civ 1832, [2002] 1 Lloyd's Rep 295 at 302).

44. If a decision is issued in a dispute where it is binding "save for manifest error" a party wishing to challenge the decision may face insuperable difficulties if the expert is not obliged to give reasons and fails to set out the reasons for his decision.

45. The question of what a decision-maker must do when he is required to give reasons has been considered in relation to judges, tribunals and in relation to arbitrators, but not in cases relating to expert determination.

46. The requirement that reasons be given by first-instance judges and other tribunals charged with the duty to reach a judicial or quasi-judicial decision was considered most recently in Phipps v General Medical Council [2006] EWCA Civ 397, [2006] Lloyd's Rep. Med. 345 Wall LJ:

> "77. That said, there is, in my judgment, considerable force in Mr. Pennock's submission that there is no reason why doctors sitting in judgment on their peers should be exempt from the general rules which apply to all other tribunals. Plainly, the need to give reasons for findings of fact will vary from case to case, and will depend on the subject matter under consideration. There may be cases where such reasons are unnecessary because they emerge clearly from the court's findings: there may be cases where the expression of such

> reasons is essential. The test in every case, it seems to me, is the same, and finds its expression in many places in the books, most succinctly in paragraph 16 of this court's judgment in English v Emery Reimbold & Strick [2002] 1 WLR 2409 at 2417, to which I have already referred, namely:
>
> > "[16] We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost."
>
> 78. The decision of this court in English v Emery Reimbold is, of course, primarily addressed to the professional judiciary. However, it both contains a summary of the European jurisprudence, and, in my judgment, reaches conclusions which are applicable to any tribunal charged with the duty to reach a judicial or quasi-judicial conclusion.
>
> …
>
> 81. As I have already indicated, the application of the principles set out in English v Emery Reimbold seems to me universal, and there are many similar statements in the books dealing with the manner in which different Tribunals are required to go about their respective tasks……" (Emphasis added)

Sir Mark Potter P. agreed with these observations (at paragraph 106). See further Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 Henry LJ at 381-2: in the planning context, Lord Brown in South Bucks DC v Porter (No 2) [2004] 1 WLR 1953, [2004] UKHL 33 at paragraph [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision."

47. With regard to arbitration, section 52(4) of the Arbitration Act 1996 provides that an arbitration award must contain reasons unless either it is an agreed award or the parties have agreed to dispense with reasons. Sections 67 to 69 provide for appeals on points of law and other kinds of challenge in certain circumstances, and section 70(4) gives the court power to order the tribunal to state the reasons for its award in sufficient detail to enable the court properly to consider the application or appeal to the court. See Transcatalana De Commercio S.A. v. Incobrasa Industrial E Commercial Brazileira S.A. [1995] 1 Lloyd's Rep. 215 Mance J. at page 217; Hayn Roman & Co. S.A. v. Cominter (U.K.) Ltd. [1982] 2 Lloyd's Rep. 458 Goff J at page 464.

The parties clearly intended that the Decision should be subject to review, as they stipulated that it should be binding save for manifest error. But unless the Decision contains reasons which are sufficient to explain why Halifax Life's principal contentions were rejected, in other words why on these points ELAS won and Halifax Life lost, it is impossible to tell whether the Umpire has made a serious error.

48. Where an expert conducting an expert determination is provided with information by one of the parties and that information is not known to the other party, it is incumbent on the expert, if he is obliged to give reasons, to summarise the information which has led him to his decision so that both parties may know how the expert has reached that decision, and so that the parties may know why one party has succeeded on the principal issues and why the other party has lost on those issues.

49. The Umpire has stated that he has taken account of all the information provided to him. But without the Decision containing a summary of what information has been provided to him, it is impossible to see whether he has obtained sufficient information or whether he has correctly taken account of that information. Halifax Life are concerned that the Umpire may have failed to make sufficient enquiries to enable him to make his own determination of the reserves actually held by ELAS, rather than simply taking at face value the calculations produced by ELAS. The points which Halifax Life had made and which were recorded in the Directions made after the Fourth Directions Hearing (for example the points about deferred annuity and expense reserves referred to at the foot of the second page of Halifax Life's letter dated 24 July 2006), made it essential that the Umpire should himself ascertain the detailed reserving bases and assumptions actually used in 1999 and 2000 for all of the liabilities (including investment costs in respect of unit linked policies and in respect of widow's benefit and escalation for deferred annuities). Having ascertained the detailed reserving bases and assumptions he should then have determined the correct reserve figures from these. The Umpire could not simply accept the numbers shown in the ELAS spreadsheet without investigating the information and the calculations lying behind those numbers in order to satisfy himself that ELAS had properly calculated the numbers shown for each product line in each column, and taking account of the specific areas of concern which Halifax Life had expressed.

50. The fact that the Umpire did not directly address Halifax Life's principal contentions even after receiving Halifax Life's comments on the draft determination suggests that he did not in fact carry out the investigations he should have carried out in order to be able to address these points. A failure to make sufficient enquiries would be a material departure from instructions, and if it was sufficiently apparent from the reasons contained in the Decision it would amount to a manifest error.

51. Moreover, the Umpire decided to proceed by arranging private meetings with each party. By proceeding in this way, and by failing to direct that disclosure should be made to Halifax Life of information covered by the Information Request, it was all the more important that the Umpire should explain in his Decision what he had learnt from his private meetings with ELAS representatives, what documents he had been shown and how this information influenced him in deciding how to deal with the concerns expressed by Halifax Life. The requirement to give reasons carried with it a requirement that the reasons should include sufficient information about matters brought to his attention by ELAS privately that Halifax Life should be able to

understand the Umpire's process of reasoning and determine whether or not that process of reasoning was manifestly erroneous.

52. The Umpire failed to comply with his obligation to give reasons for his Decision. This was a material departure from his instructions, and accordingly his Decision is not the decision called for by the Agreement and is not binding on the parties. The departure from instructions is clearly not de minimis or trivial. It is a matter of considerable importance to Halifax Life, as the absence of reasons makes it impossible to determine whether the decision is based on a manifest error.

53. A requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not. Where there is a contractual requirement that reasons are to be given, it is not enough to say that the reasons can be inferred. Moreover while there may be cases in which a decision-maker's reasoning is obvious and may be capable of being inferred, this case is very much more complicated, and to say that the Umpire saw no force in Halifax Life's contentions does not provide any explanation as to why he saw no force in those contentions. Even if that inference is drawn, it does not sufficiently explain why on those points he should have decided against Halifax Life.

54. If the Umpire's Decision is not binding, a determination in accordance with clause 4.3 of the Agreement still needs to be made.

It would no longer be satisfactory for the matter to be determined by Mr Taylor. In the absence of agreement between the parties on the identity of the new umpire, the President of the Institute of Actuaries should be asked to appoint a new umpire following submissions from the parties on questions of conflict.

55. Where the procedure for an expert determination has broken down, the court has jurisdiction to give directions for alternative machinery, except in a case where the original contractual machinery is an essential term of the contract and there has not been part performance: Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444. Lord Diplock (at page 477G-H) envisaged that it might be necessary to appoint a fresh valuer if the original valuer fails to comply with his instructions. Macro v Thomson (No. 3) [1997] 2 BCLC 36, at pages 69-73, is an example of a case where the court gave directions for a new determination to be made in place of a fair value being fixed by the company's auditors in accordance with the Articles of Association.

ELAS' submissions

Mr Butcher QC for ELAS submitted as follows.

56. The first answer to Halifax Life's case is that the Decision remains binding whether or not there was a failure to give reasons.

57. In cases concerned with instructions as to the nature of the determination process, it can be said that if the expert has not carried out a determination according to the methodology prescribed (e.g. a testing or sampling method) the parties have not agreed to be bound by the result. The position is very different in relation to a procedural matter such as giving reasons. The procedural requirement is ancillary to the determination itself. It cannot normally be said that a failure to follow a procedural requirement means that the parties have not agreed to be bound by the determination, if it was a determination of the question which the expert was asked to decide. On any view it would only be what was obviously a very serious departure from such a procedural provision which it could be suggested would have that effect.

58. The answer to the question - did the Umpire in reaching his Decision carry out a task different from the one with which he was charged? is no. His task was to determine the value of the Initial Premium in accordance with the approach laid down in clause 4.2.2 of the Agreement. That is what he did. A failure to give (adequate) reasons does not mean that he performed some other task.

59. This conclusion is emphasised by the Terms of Reference which draw a distinction between the Decision itself and the procedural requirement as to the giving of reasons. The Decision is to be accompanied by reasons.

60. A failure to give adequate reasons does not (generally and certainly not here) mean that the decision is not binding. There is no case which suggests such a result. Equally Kendall: Expert Determination (3rd ed.) does not consider the possibility that a failure to give reasons might lead to the decision not being binding. It envisages only that a failure to give reasons where there is a requirement for reasons might (in an appropriate case) mean that the court could order the expert to make good his breach of contract by supplying reasons (see paragraph 15.13.7).

61. It would be highly anomalous if an expert's failure to give reasons caused the determination not to be binding, when this is not the position in the case of arbitration awards.

62. The Decision is binding on Halifax Life whether or not reasons (or adequate reasons) were given.

63. Even if (contrary to ELAS' primary contention) a failure to give reasons can in principle invalidate the Decision, it does not matter because the Umpire clearly complied with his obligation to provide reasons under the agreed Terms of Reference.

64. It is only if it can be said that no reasons were given that Halifax Life's case can even get off the ground. If, as a matter of ordinary language, "reasons" were given, then Halifax Life's case must fail.

65. "Reasons" were given by the Umpire. The Umpire accordingly complied with clause 10 of the Terms of Reference.

66. As to Halifax Life's case that if the Umpire provided anything less than "sufficient" or "appropriate" reasons then his Decision is not binding, the Terms of Reference do not impose any obligation as to the nature, or degree of detail, of reasons to be given. There is no basis upon which the Court should imply a term that the reasons provided be sufficient or adequate. The Terms of Reference agreed by the parties work perfectly well with the simple express requirement to provide reasons without more.

67. Halifax Life is seeking to impose a requirement as to the degree of reasoning required which is not provided for. If the Umpire did not give anything which could ordinarily be described as reasons (for instance if he had simply said nothing), then he would not have complied with the requirement on him to give reasons.

68. If the parties want to show that the expert has to provide more than what would, as a matter of ordinary language, count as "reasons", then they need to provide for that expressly. Clauses in which that is done are known: see Shell UK v Enterprise Oil [1999] 2 Lloyd's Rep 456. The Umpire was simply required to provide "reasons" and if he provided what can fairly, as a matter of ordinary parlance, be described as reasons, which he did, he has complied with the clause.

69. The type of considerations which require reasons from judges and arbitrators do not apply to expert determinations. Flannery v Halifax Estates Agencies Ltd above states that the requirement for giving reasons is a function of due process. But due process is not relevant to an expert determination (Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd [2004] EWHC 977 (Comm), [2004] 2 Lloyd's Rep 355, Cooke J).

70. Judges and arbitrators have to indicate how the various arguments which have been addressed to them have been dealt with (see in particular Transcatalana de Commercio above and Hayn Roman v Cominter above). But experts are not required to deal with the submissions of the parties.

71. Further, expert determinations admit of no appeals. The requirements as to reasons which arise from the possibility of appeals are absent in the case of expert determinations.

72. What is required of other tribunals cannot be used as a basis for arguing that experts have to provide a particular degree of reasoning. Halifax Life's argument that reasons must be given so as to allow the parties to see if there has been a "manifest error" and to allow them the possibility of challenging the determination on that basis is wrong. What the parties have done in the present case is simply to provide for "reasons". The number and extent of the reasons which are provided is left to the Umpire. There is no requirement that the reasons that the expert should give should be "adequate" or "sufficient".

73. But even if the Umpire were required to give "sufficient" reasons, the reasons actually provided by the Umpire were sufficient reasons. The Umpire did not depart from his instructions by failing to give reasons, whether or not those reasons had to be "sufficient". Further, even if there was any such failure, it does not have the result

that the Decision is not binding. Further, the Decision does not contain a manifest error. The criteria are onerous.

Halifax Life could have applied for specific performance of the Umpire's obligation to give reasons. Thus, Kendall on Experts (para 15.13.7) suggests that this remedy will be available where an expert contractually bound to give reasons fails to do so. It is submitted that the same remedy must be available where the relevant failure is the provision of adequate reasons (assuming, of course, that there has been such a failure): there is no reason why a total failure to give reasons is able to be cured by specific performance, but the provision of inadequate reasons cannot be.

74. No question of making any directions arises. But even if the Court is minded to make any directions, ELAS does not accept that it can or should make the directions requested by Halifax Life. There has been no breakdown in the machinery of the expert determination; the Agreement has not been frustrated. This is not a case where the Umpire has refused, or is unable, to act. The most that could possibly be said is that there is an outstanding obligation under the Agreement, namely the requirement that the Umpire give (sufficient) reasons. If the question arose at all, the most appropriate way of ensuring that this obligation is fulfilled would be to ask the Umpire to rectify any shortcomings in his reasons.

75. Finally there would be significant practical problems if the Court were to make the directions Halifax Life seeks.

Analysis and Conclusions

76. No allegation of fraud, collusion or partiality is made in the present case.

The starting point a matter of construction of the contractual provisions.

77. It is necessary to construe (a) the relevant provisions of the Reassurance Agreement and (b) the Terms of Reference of the Umpire, to see as a matter of contract (i) what the parties agreed to remit to the Umpire by way of expert determination, (ii) what the Umpire was appointed to do and (iii) whether the Umpire has done what he was appointed to do.

78. In Bernhard Schulte & Ors v Nile Holdings Ltd [2004] 352 at 372, paragraph 95 Cooke J said:

> "There is an essential distinction between judicial decisions and expert decisions, although the reason for the distinction has been variously expressed. There is no useful purpose in phraseology such as "quasi judicial" or "quasi arbitral" as Lord Simon made plain in Arenson and although the use of the word "expert" is not conclusive, the historic phrase "acting as an expert and not as an arbitrator" connotes a concept which is clear in its effect. A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves. Although, contrary to what is said in some of the authorities, there are many expert determinations of matters where disputes have already arisen between the parties, there is a difference in the nature of the decision made and as Kendall points out in para 1.2, 15.6.1. and 16.9.1. the distinction is drawn and the effect spelt out, namely that there is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties. " (emphasis added).

79. Whereas reference to general statements in the authorities about expert determinations is helpful in general terms, it must always be remembered that expert determinations are called for in a wide variety of differing contracts relating to differing commercial contexts. Thus what is called for in relation to a load port determination by independent inspectors of the quantity and quality of gasoline (see for example AIC Ltd v ITS Testing Services (UK) Ltd 'The Kriti Palm' [2005] EWHC 2122 (Comm) and [2006] EWCA Civ 1601) may differ markedly from what is called for in a determination by independent accountants of the amount of sales in connection with an agreement to purchase shares (see for example Jones and Others v Sherwood Computer Services Plc [1992] 1 WLR 277).

In the present case the Umpire was appointed to resolve the Issues (as defined) by way of expert determination in accordance with the provisions of the Reassurance

Agreement and the Terms of Reference. The parties had to provide to him such information and documentation as he reasonably required and to make available to be questioned by him any person whom he considered to be able to supply information of relevance to the determination of the Issues. In rendering a decision on the Issues the Umpire was entitled to consider only the matters in dispute and was entitled only to take into account such evidence and information as the parties put before him or provided to him at his request or in response to any enquiry carried out by him (see also in this connection para 2.4 of Schedule 2 to the Reassurance Agreement). If directions could not be agreed, the Umpire's directions were to prevail. The Umpire was required to include, with the Decision, reasons for the Decision. The appointment of the Umpire was one off, subject to the express provisions of his mandate and in unique circumstances.

Mistake and material departure from instructions distinguished

80. A mistake is made when an expert goes wrong in the course of carrying out his/her instructions. If an expert makes a mistake while carrying out his/her instructions, the parties are bound by it for the reason that they have agreed to be bound by it. Where the expert departs from instructions in a material respect, the parties have not agreed to be bound. (Veba Oil Supply and Trading G.m.b.H v Petrotrade Inc [2001] EWCA Civ 1832, [2002] 1 Lloyd's Rep 295 at 300-301, Simon Brown LJ).

Departure by expert from instructions in a material respect

81. If the expert departs from his/her instructions in a material respect, either party is able to say that the decision is not binding because the expert has not done what he/she was appointed to do (Jones v Sherwood supra at 287A to B, Dillon LJ). Once a material departure from instructions is established the decision is not binding on the parties. A material departure vitiates the decision, whether or not it affects the result. Any departure from instructions is material unless it can properly be characterised as trivial or de minimis, in the sense of it being obvious that it could make no possible difference to either party. (Veba Oil supra at p 301, Simon Brown LJ).

Manifest Error

82. Where a contract provides that a decision shall be final and binding save for "manifest error", "manifest error" means "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion" (Veba Oil supra at 302, Simon Brown LJ).

Reasons

83. In litigation justice will not be done if it is not apparent to the parties why one has won and the other has lost.

The conclusions to this effect in English v Emery Reimbold above are applicable to any tribunal charged with the duty to reach a judicial or quasi-judicial decision (see Phipps v GMC above, per Wall LJ at paras 77, 78 and 81).

In arbitrations –

> "The policy of the law has now changed. Not for the purpose of facilitating appeals, but because this is what justice to the parties required, it is now prescribed that every award must give reasons unless it is a consent award or the parties have agreed to dispense with them: section 52(4) of the 1996 Act. ...
>
> The giving of reasons is however linked to the appellate process to this extent that if on an application for permission to appeal it appears to the court that the award does not contain the tribunal's reasons, or does not set them out in sufficient detail to enable the matter to be properly considered, the court may order the tribunal to state the reasons in detail for that purpose: section 70(4)."

Commercial Arbitration Mustill & Boyd Second edition 2001 Companion para 596-600.

84. In the present case a "speaking" decision was called for (Kendall Expert Determination 3rd edn, paragraph 15.13.1). By paragraph 10 of the Terms of Reference the Umpire was required to include, with the Decision, reasons for the Decision. I repeat that it is necessary to construe (a) the relevant provisions of the Reassurance Agreement and (b) the Terms of Reference of the Umpire, to see as a matter of contract (i) what the parties agreed to remit to the Umpire by way of expert determination, (ii) what the Umpire was appointed to do and (iii) whether the Umpire has done what he was appointed to do.

85. Interpretation of the word "reasons" involves the ascertainment of the meaning which that word would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

Applying this approach in my opinion the Umpire was required to provide reasons which were intelligible and adequate in the circumstances. The circumstances included:

i) the context (the relevant provisions of the Reassurance Agreement and the Terms of Reference); and

ii) the nature of the Issues; and

iii) the fact that the Umpire was to conduct an expert determination leading to a Decision, including reasons for the Decision (not a judicial decision or a reasoned arbitration award).

The reasons could be stated briefly but they had to explain the Umpire's reasons for his conclusions on key or substantial points raised, or in other words his reasons for conclusions on the "principal important controversial issues" (see Lord Brown in South Bucks DC above at paragraph 36).

86. This is not a case where no reasons were given. But were the reasons adequate in the circumstances?

87. On 28 November 2005 a fourth directions hearing was held in which the Umpire confirmed that he unreservedly accepted the opinion of Mr Hildyard QC and outlined the process to be followed by the parties going forward. Following that meeting, and as agreed at it, on 2 December 2005 Mr Myers provided the Umpire with the report of Mr Nicholas Dexter of KPMG. The Umpire very sensibly recorded Halifax Life's "four basic areas of concern" in paragraph 5 of his directions issued on 6 December 2005, following the directions hearing on 28 November 2005. The fact that the "four basic areas of concern" were so described might be said to constitute a recognition on the part of the Umpire that they were "principal important controversial issues". According to Halifax Life tens of millions of pounds turned on these issues.

88. The Umpire then held a series of private meetings with ELAS' actuaries, as envisaged in the directions order. These took place on 6 December 2005, 14 December 2005, 6 January 2006 and 11 April 2006.

89. On 1 March 2006 a further meeting was held between Mr Myers and the Umpire. On 7 March 2006, Mr Myers sent an email to the Umpire concerning the matters discussed during this meeting, and setting out various comments on the spreadsheet which the Umpire had shown him.

90. Save exceptionally in the course of a without notice application, a judge or arbitrator would never receive evidence or hear submissions from one party in the absence of the other. But we are here concerned with an expert determination. Mr Symons fairly accepted on behalf of Halifax Life that Halifax Life did not object to the procedure adopted. In any event the Umpire's directions were to prevail in default of agreement.

91. Following the procedure adopted (whereby the Umpire held a series of private meetings with ELAS' actuaries (and Mr Myers) in relation among other matters to Halifax Life's "four basic areas of concern") it was in my opinion incumbent on the Umpire to set out (albeit reasonably briefly) his reasons for his conclusions in relation to the "four basic areas of concern" and the evidence and information taken into account in reaching those conclusions. I find that the Umpire did not do this and accordingly I now direct the Umpire to do so. At the same time the Umpire should indicate the extent to which he has checked the relevant underlying figures (if they were not agreed). If and to the extent that the Umpire considers that the "four basic areas of concern" were narrowed by Mr Myers' email of 7 March 2006 (or Linklaters' letter of 24 July 2006 or in some other way) no doubt the Umpire will record this in his reasons.

92. I reject Halifax Life's submission that a declaration should be made now as sought in the Part 8 claim form. I agree with ELAS' submission that it would be anomalous if an expert's failure to give sufficient reasons caused the determination not to be binding, when this is not the position in relation to arbitration awards. The appropriate course is as set out in para [95] below.

93. ELAS submitted that the first answer to Halifax Life's case is that the Decision remains binding whether or not there was a failure to give reasons. In my opinion if (as I find) there was a failure to provide sufficient reasons, the appropriate course is to direct the Umpire to state his (further) reasons, and thereafter (if Halifax Life wish to pursue their Part 8 claim) to restore the matter for a further hearing.

94. I do not accept ELAS' submission that the reasons provided by the Umpire were in any event sufficient reasons. In his Determination and Findings quoted above, the Umpire does not explain his reasons for any conclusions in relation to the "four basic areas of concern" and the evidence and information taken into account in reaching those conclusions. ELAS says that it can be inferred that the Umpire rejected Halifax Life's contentions in relation to the "four basic areas of concern". It is for the Umpire to explain what his conclusions were on the "principal important controversial issues" and give adequate reasons in the circumstances.

Conclusions

95. In my judgment the appropriate course (having regard to the overriding objective) is to (a) adjourn the hearing of the Part 8 claim form, (b) direct the Umpire to state his (further) reasons in relation to the "four basic areas of concern" in accordance with para [91] above and (c) restore the hearing of the Part 8 claim as soon as the reasons are available.

96. In arbitrations, if on an application for permission to appeal, it appears to the court that the award does not contain the tribunal's reasons, or does not set them out in sufficient detail to enable the matter to be properly considered, the court may pursuant to section 70(4) of the 1996 Act order the tribunal to state the reasons in detail for that purpose.

Although there is no statutory power in the different context of an expert determination, I consider that the Court has power to direct the Umpire to state (further) reasons as above (a) by way of remedy in relation to the relevant contractual provisions and/or (b) under the inherent jurisdiction. (If I am wrong as to jurisdiction, the Court on any view has power to invite the Umpire to state (further) reasons as above by way of its case management powers).

The Umpire has not been joined as a party to the Part 8 claim form. I was told however that he has been notified of these proceedings. I see no need to join the Umpire (unless he wishes to intervene and make representations).