The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd
[2008] SGHC 236

Case Number : OS 986/2006 , SUM 2450/2008

Decision Date : 22 December 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : N Sreenivasan and Palaniappan S (Straits Law Practice LLC) for the applicant; Michael Hwang SC (Michael Hwang), Muthu Arusu and Tay Yong Seng (Allen & Gledhill LLP) for the respondent

Parties : The Oriental Insurance Co Ltd — Reliance National Asia Re Pte Ltd

Civil Procedure – Damages – Interest – Whether court could award compound interest as damages – Whether independent adjudicator applied discount correctly

Civil Procedure – Experts – Setting aside expert's decision – Whether grounds existed for setting aside determination made by independent adjudicator – Whether independent adjudicator bound by rules of natural justice

Contract – Contractual terms – Parties agreeing to resolve differences through independent adjudicator – Whether terms of reference appointing independent adjudicator was for process of expert determination

22 December 2008 Judgment reserved

Chan Seng Onn J:

Introduction

1 By way of Summons No 2450 of 2008, the applicant, Oriental Insurance Co Ltd ("OIC") filed an application seeking to set aside the determination made by an Independent Adjudicator ("IA") appointed pursuant to a Scheme of Compromise and Arrangement ("Scheme") undertaken by the respondent, Reliance National Asia Re Pte Ltd, ("RNA") and for the matter to be remitted to the IA for re-adjudication.

Background

2 RNA is a general reinsurer registered and licensed in Singapore. OIC is a direct general insurer registered and licensed in India. The salient facts of this matter principally revolve around OIC's issuance of a US$20m insurance policy in 1998 covering a Single Point Mooring Buoy ("SPM") owned and operated by an Indian company, Reliance Industry Limited ("RIL"). The SPM is a floating device that allows vessels to dock offshore and facilitates the conveyance of oil between these vessels and an on-shore refinery through the use of hoses and pipelines. OIC retained 6.35% of the risk and reinsured the remaining 93.65% to several reinsurers. RNA is one such reinsurer which accepted 38.35% of the risk and became the lead reinsurer.

3 The SPM was struck by a vessel named "Emerald Sky" on 12 October 1998 and eventually sank on 16 October 1998. It was retrieved to the surface on 12 November 1998 and was subsequently transported to RIL's refinery site in Jamnagar, India. RIL duly commenced an admiralty action against that vessel in Ahmadabad, India in November that year.

4 On 26 October 1999, RIL commenced an action under the insurance contract against OIC in Surat, India. That was because a dispute arose between RIL and the underwriters (OIC and reinsurers led by RNA) on how the loss should be settled: as a constructive total loss ("CTL") or a particular average loss. To get payment on a CTL basis, the cost of recovering and repairing the insured property would have to be higher than the agreed insured value. In the case of the SPM, the agreed insured value was INR 517,500,000 (or US$12,652,812 at the exchange rate of US$1= INR40.9 as at 14 May 2007). A CTL claim would also allow RIL, the plaintiff in the Surat suit in India, to receive certain additional payments. Not surprisingly, RIL insisted that the SPM was a CTL but the underwriters were not prepared to accept this before a fully-stripped down inspection of the SPM was carried out to examine the full extent of the damage.

5 Both actions in India are still pending. RIL's claim in India against OIC, the defendant in India, is for the **principal sum** of INR 991.9m (or **US$24.25m** at the exchange rate of US$1= INR40.9 as on 14 May 2007) plus **interest at 21% p.a**. on the principal sum from the date of loss on 12 October 1998 **till the date of payment**, of which RNA's share amounted to 38.35%. See [61] for the details of the portion of RNA's share as stated by the IA.

6 It is crucial for the purpose of this judgment to note that the IA himself recognised at p 3 of his determination that the claim by RIL in India includes interest on the principal claim amount, which is to continue accruing up to the date of final payment and that the interest claimed by RIL is not going to simply terminate at the valuation date of the Scheme Claim specified to be 19 September 2006 or the Scheme cut-off date of 14 May 2007, which dates are in any event of no concern to RIL who is not a party to the Scheme. Hence, if RIL's claim was to be allowed by the Surat court, the **total judgment sum** that OIC is liable for will most likely include both the **principal sum** plus **interest on that principal sum up to the date of judgment** (*i.e.* pre-judgment interest). This **pre-judgment interest** thus forms a part of the damages and merges with the principal sum to become a single **total judgment sum** under the doctrine of merger.

7 Thereon, as with the normal practice of the Singapore courts in granting **post-judgment interest** in addition to the total judgment sum up to the date of payment (see O 42 r 12 of the Rules of Court (Cap 322, R5, 2006 Rev Ed), *Trans Elite Equipment Rental Sdn Bhd v PSC-Naval Dockyard Sdn Bhd* [2003] 4 MLJ 30, *NM Rothschild & Sons (Singapore) Ltd & Ors v Rumah Nanas Rubber Estate Sdn Bhd* [1994] 2 SLR 160 and *Chia Ah Sng v Hong Leong Finance Limited* [2001] 1 SLR 591), the Surat court will probably also grant further **post-judgment interest** (similarly calculated on the total judgment sum) which will run from the date of its judgment till the date of actual payment by the judgment debtor, OIC, to the judgment creditor, RIL, in India.

8 What is clear therefore is that the Surat court will not be concerned at all with the terms of the Scheme agreed between RNA and its Scheme creditors and its award of pre-judgment interest on the principal claim amount will not stop accruing or stop running on either the valuation date of 19 September 2006 or the cut-off date of 14 May 2007. The Surat court will most probably allow the **pre-judgment** interest to accrue up to the date of its own judgment. See also the further discussion on the issue of the correct valuation date in [67] to [82].

9 In exercise of its claim's control clause, RNA took over the management of the legal proceedings before the Surat court and appointed solicitors to participate in the litigation in Surat. RNA solely handled the proceedings in Surat in connection with RIL's claim apparently to the exclusion of OIC, the named defendant in India.

10 In 2001, RNA encountered financial difficulties and ceased writing new business. It entered into a voluntary run-off of its business in April 2001. RNA's parent, Reliance Insurance Company in the

United States of America, was put into liquidation on 3 October 2001. RNA was subsequently bought over by Whittington Investments Guernsey Ltd on 1 July 2004 which decided to accelerate the run-off of RNA's business by promoting to RNA's creditors a solvent Scheme under s 210 of the Companies Act (Cap 50, 2006 Rev Ed).

11 The Explanatory Statement on the Scheme states, *inter alia*, the following points:

(a) RNA was solvent as of 31 December 2005 with assets of S$36.9m, liabilities of S$28.1m, and a net asset value of S$8.8m.

(b) The run-off of RNA's business would be expected to take many years. As such RNA believes a Scheme should be the most efficient and effective method of making **full payment** to Scheme creditors.

(c) The claim estimation, Scheme creditors were required to estimate their claims but there will be no opportunity to make further claims if future events do not reflect the amounts claimed under the Scheme.

12 The object of the Scheme was to conclude this process of "run-off" in the shortest practicable time. To do so, the Scheme employed a practical process of estimating all present and future claims (including contingent claims) of Scheme creditors before paying out on those claims in full: see [2.1] of the Scheme.

13 OIC supported the Scheme on the basis that it would be able to seek full indemnity from RNA in connection with RIL's claim against it (*i.e*. OIC) in the Surat proceedings. OIC, as one of the largest Scheme creditors, voted in support of the Scheme. At the court-sanctioned meeting on 26 September 2006, the Scheme creditors comprising entirely of professional insurers and reinsurers voted and approved the Scheme with the requisite statutory majority. The IA noted that without OIC's support, it was not likely that the Scheme would have materialised. The Scheme was subsequently approved by the High Court on 7 November 2006.

14 The Scheme required each creditor to file a proof of debt with supporting documents. The manager of the Scheme ("the Scheme Manager") would ascertain the claim and if there was a dispute, an Independent Adjudicator ("IA") would determine the dispute. The IA's decision is final and binding and "*cannot be appealed from to the Courts or to be submitted to arbitration*". Paragraph 4.6 of the Scheme states:

4.6 Subject to any mandatory applicable law,**the determination of the Independent Adjudicator** in respect of any differences or disputes referred to him pursuant to any provision of this Scheme **shall be final and binding on the Company and the Scheme Creditor, and there shall be no right of appeal therefrom**, and no right to make any claim against the Independent Adjudicator in respect thereof. (Emphasis added.)

15 Schedule 2: "RERRERAL TO INDEPENDENT ADJUDICATOR" of the Scheme reiterates the finality and binding nature of the IA's decision and the exclusion of all appeals to the courts as follows:

5. The decision of the Independent Adjudicator shall for the purposes of this Scheme be **final and binding on all parties** and **cannot be appealed from the Courts or be submitted to arbitration**. (Emphasis added.)

16 In this connection, the full background behind the present Scheme had been set out by the

Court of Appeal in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR 121 ("*Oriental Insurance*") where OIC had successfully sought an extension of time to file its proof of debt under the Scheme.

17 OIC stood to be indemnified by RNA for 38.35% of the final quantum of liability that the Surat court may ultimately award against OIC and in favour of RIL. Essentially, what is before me is OIC's claim in respect of its reinsurance with RNA of 38.35% of RIL's insured loss that OIC now has to bear in India, which constituted a contingent liability that OIC had already notified its re-insurers, namely RNA. OIC therefore had a "notified outstanding claim" within the meaning of the Scheme, upon which it could submit a proof of debt to RNA under the Scheme.

18 In January 2008, OIC submitted a proof of debt worth some US$24m plus interest of US$1.95m p.a. from 15 May 2007 till payment. However, the Scheme Manager determined the debt to be only worth US$1,964,000. Dissatisfied with the result, OIC referred its proof of debt to the process of Independent Adjudication provided under the Scheme.

19 After three rounds of written submissions and an oral hearing, the IA rendered his final determination on 2 June 2008 ascertaining the total Scheme claim to be US$3,840,584, comprising the principal amount of US$3,176,168 plus interest of US$664,416 at 13.5% p.a. for an allowed discounted period of only 1.5 years. Dissatisfied with that outcome, the applicant filed the present application to set aside the IA's determination, seeking to remit the matter to the IA for a re-determination.

The applicant's case

20 OIC submitted that the IA's mandate and duties under the Scheme may accordingly be summarised as follows:

(a) The IA has to determine the prospective, contingent and unliquidated claim arising from the reinsurance contract between OIC and RNA;

(b) The IA has to act in the interest of Scheme creditors as a whole;

(c) The IA has to exercise his powers so as to ensure that the Scheme is operated in accordance with its terms, that is, to ensure that OIC and all Scheme creditors are paid in full in respect of all the claims;

(d) The IA in the course of his determination has to act in good faith and with due care and diligence.

21 According to OIC, it is on the above being satisfied that the IA's decision is final and one that cannot be appealed against. Only if the IA had followed the above principles and adhered fully to his instructions would the Scheme creditors be bound by his decision. However, where it can be shown that he acted without due care and diligence, departed from the very instructions he was to follow or failed to give effect to the terms and purpose of the Scheme, then the IA's decision cannot be said to be conclusive. None of the Scheme creditors would have agreed to IA's decision being final and binding, in the event the decision can be shown not to be in their interest as a whole or if it can be shown that it was reached without due care and diligence or if it had been reached without heeding the instructions which the IA had to follow. This was the contractual bargain entered into by the parties under the Scheme.

22 OIC further contended that the mode of dispute resolution chosen by the parties under the Scheme was not one of "expert determination", but that of "adjudication". The significance of this distinction lies in the narrow scope under which the court would disturb an expert's award rendered after a process of expert determination. OIC contended that even if the mode of dispute resolution chosen was that of expert determination, that determination ought to be set aside on three grounds:

(a) The IA departed from his instructions by asking the wrong question;

(b) There were manifest errors in the determination that required judicial intervention; and

(c) The IA's failure to order the production of certain documents and disclosure of certain information prevented OIC from properly presenting its case before the IA, which had resulted in a failure to show natural justice and accordingly, injustice had occurred to RNA. As the court had supervision of the Scheme sanctioned by an order of court, it had the inherent jurisdiction to remedy that injustice.

23 OIC also complained of the IA's failure to act with due care and diligence in the interests of the Scheme Creditors as a whole. OIC clarified that it was not alleging any lack of *bona fides* on the part of the IA, but he had reached conclusions that no right minded IA exercising due care and diligence would have reached.

24 I shall address each contention in due course.

Principal modes of dispute resolution

25 It is not disputed that there are broadly four principal modes of dispute resolution where the disputants submit their dispute to a neutral third party, having and exercising the authority to hear their respective positions and make a decision binding on them:

(a) Litigation - a process administered through the courts. A judicial officer of the court makes a binding decision on the dispute.

(b) Administrative or statutory tribunals - adjudication by a tribunal established by statute to determine statutory issues *e.g.* tax, land compensation awards and social security benefits.

(c) Arbitration - a procedure usually governed by arbitration rules laid down by statute or imposed by an arbitral organisation. A neutral third party privately chosen and paid by the disputants makes a binding decision.

(d) Expert determination - parties appoint their own expert to consider the disputed issues and make a binding decision, without necessarily having to conduct a full enquiry following the usual adjudicatory rules *e.g.* rules of court in litigation, formal arbitration rules and general rules of natural justice. The role of the expert is to undertake an investigation of the facts and to determine a dispute using his own expertise. His power and jurisdiction is derived solely from the terms of the contract.

26 See also *ADR Principles and Practice, Brown and Marriott* (London, Sweet & Maxwell, 1993):

Adjudication

As a generic term, adjudication is a dispute resolution process in which a neutral has and

exercises the authority to hear the respective positions submitted by the disputants and to make a decision on their dispute which will be binding on them. This may occur by:

– *Litigation*, where the process is administered through the Courts and the neutral adjudicator is a judge, district judge, master, Official Referee or other official appointed by the Court to undertake this function.

– *Arbitration*, where the neutral is privately chosen and paid by the disputants and/or the procedure regulating the dispute follows arbitration rules which may be statutory or imposed by an arbitral organisation.

– *Administrative or statutory tribunals*, where the adjudication follows certain specific statutory requirements, such as establishing rent levels, compensation awards, social security benefits or a range of other matters through tribunals and appeal tribunals

– *Expert determination*, in which the parties appoint an expert to consider their issues and to make a binding decision or appraisal without necessarily having to conduct and enquiry following adjudicatory rules.

– *Private judging*, in which (in those jurisdictions which have adopted this procedure, not yet within the United Kingdom) the Court refers the case to a referee chosen by the parties to decide some or all of the issues, or to establish any specific facts.

27 As pointed out by Rajah J in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 ("*Evergreat*"), these different roles attract different attributes and entail consequences peculiar to the respective appointments. Parties who wish to have an alternative mode of dispute resolution may draw on the different principles, attributes and procedures in each of the above processes, and devise an agreed method or approach which fits their particular needs and circumstances. In choosing their alternative mode of dispute resolution, the parties are not constrained to any of the above processes or by any particular set of attributes or procedures. Hence, hybrid processes may be contractually formulated by the parties themselves to resolve a particular dispute in a manner considered most appropriate by them. The choice is basically theirs.

28 Given that the IA in this case was an expert chosen by the parties themselves pursuant to the statutory contract in the form of the Scheme, the IA's dispute resolution process can only be either arbitration or expert determination and with such other modifications the parties to the Scheme may have agreed.

Whether mode of dispute resolution is that of expert determination

29 OIC characterised the mode of dispute resolution under the court ordered Scheme as one of expert determination and not "adjudication". OIC contended that:

(a) The IA is not obliged only to consider the correct question, but he is also required to take into account the arguments of various parties. He needs to consider the burden of proof on each party. He needs to assess the credibility of each position taken by the parties, ascertain the truth of the matter and to judge the matter. The "adjudication" under the Scheme is more akin to arbitration than an expert determination;

(b) The "adjudication" in this case is also clearly subject to the IA acting with due care and diligence. The Scheme is an order of court. The IA is exercising powers under that order of court

and not pursuant to a contract between parties. The underpinning of the reasoning in the case law -- that parties are bound by their contractual bargain -- is not applicable to a court ordered Scheme;

(c) Paragraphs 9.4 and 9.5 of the Scheme (see [30]) expressly provide for the IA to act with due care and diligence. Paragraph 9.5 specifically states that the IA will not be liable unless he is negligent. Challenge is not prohibited absolutely; it is only prohibited where the IA has acted in good faith and with due care and diligence. The Scheme clearly does not place the IA on the unassailable pedestal that the case law appears to place the expert on. In the premises, the IA's decision can be challenged in court for want of due care and diligence, and not only on the limited grounds put forward by RNA.

30 The reasons proffered by OIC in its characterisation were that, unlike the present case, an expert in an expert determination does not step into the fray after an earlier determination (*i.e.* the ascertainment by the Scheme Manager) and is not put in as a form of appeal mechanism. Secondly, OIC contended that because the Scheme was an order of court, the IA was exercising powers under that order and not pursuant to a contract between parties. Lastly, OIC cited the following paragraphs 4.4, 9.3, 9.4 and 9.5 of the Scheme:

4.4 In the event that the Company or any Scheme Creditor serves on the Scheme Manager a notice…stating that it disagrees with or disputes the amount of its Scheme Claim determined by the Scheme Manager,… **the amount of the Scheme Claim of that Scheme Creditor shall be determined by the Independent Adjudicator**.

…

9.3 Subject to any agreement between the Company and the particular Scheme Creditor in relation to a Disputed Claim, **the Independent Adjudicator shall be responsible for the adjudication and determination of Disputed Claims** and shall have the powers, rights, **duties** and functions conferred upon him by the Scheme for such purposes.

9.4 In exercising his powers and rights and in carrying out his duties and functions under the Scheme, **the Independent Adjudicator shall act in good faith and with due care and diligence in the interests of the Scheme Creditors as a whole** and shall exercise his powers and rights under the Scheme to **ensure that the Scheme is operated in accordance with its terms**.

9 . 5 **No Scheme Creditor shall be entitled to challenge** the validity of **any act** done or permitted to be **done in good faith and with due care and diligence by the Independent Adjudicator** pursuant to the provisions of the Scheme or in the exercise or performance of any power, right, duty or function conferred upon him under the Scheme and **the Independent Adjudicator shall not be liable for any loss unless any such loss is attributable to his own negligence, wilful default, wilful breach of duty or trust, fraud or dishonesty.**

31 OIC argued that the above paragraphs do not prohibit a challenge to the IA's determination based on a lack of due care and diligence. According to OIC, the IA in this case was performing an "adjudicating" role whereby he was not only obliged to consider the correct question as an expert in an expert determination ought to, but to also take into account the arguments of various parties, consider the burden of proof on each party and assess the credibility of each position taken by parties. OIC submitted that "adjudication" in this regard was more akin to a process of arbitration than an expert determination.

32 I have no difficulty in dismissing those arguments of OIC. I do not agree that the IA's particular role and functions in this case are more in the nature of an arbitrator than an expert determiner. In my view, parties to the Scheme had envisaged that the mode of dispute resolution to be that of an expert determination, and not an amorphous concept of "adjudication" that straddled somewhere between arbitration and expert determination along the spectrum of alternative dispute resolution.

33 Paragraphs 4.4 and 9.3 of the Scheme are also framed widely so that the expert is given considerable flexibility and latitude to apply his own expertise to address the problem at hand, assess and quantify the Scheme claim and determine the dispute submitted to him: see *Evergreat* (*supra* [27]) at [35]. These features are typical of expert determinations.

34 Whilst the Scheme provides for a procedure for the parties to tender written submissions and attend hearings before the IA, the IA is not confined to accept or adopt either one of the methodologies advocated by the parties in their submissions or by the experts who had given expert evidence on behalf of the parties. The IA can still rely on his own experience and special expertise to reach his own independent conclusions and decisions (which can be very different from either of the parties' positions or the positions of the experts called by the parties), subject of course to the terms of reference and the instructions for the expert determination which the IA is obliged to act within at all times.

35 The name given of "Independent Adjudicator" in the Scheme does not necessarily mean that he is not an expert determiner in an expert determination but that the process must be one of "adjudication" where he ought not to rely at all on his own expertise and experience but is confined exclusively to the evidence (expert and factual) led by the parties.

36 The fact that paragraph 4 of Schedule 2 of the Scheme requires the IA firstly, under sub-paragraph (i) to call the various parties to provide written submissions on their respective valuations on the amount of their Scheme claims which may include any expert evidence supported by relevant documentation; and secondly, to hear oral representations which parties in the dispute will be allowed to make under sub-paragraph (iii), is, in my view, not inconsistent with an expert determination, as these party representations assisted by other experts usually help the IA to better understand the various issues that have been entrusted to him as the chosen expert to finally determine the dispute between the parties. As aptly stated at [12.6.1] in John Kendall, Clive Freedman & James Farrell, *Expert Determination* (4th Ed, 2008) ("*Kendall*"):

> Even though some expert clauses do not specifically reserve the right of the parties to make submissions or representations to the expert, the expert will usually want to receive submissions or presentations of some kind to help to understand the issue that has to be determined. The expert will in most cases want each party to send in a written submission accompanied by copies of the documents referred to or relied on in the submission.

37 Under the Scheme, the IA is not required to issue a reasoned decision for his determination. In fact, he is obliged to issue a non-speaking determination, which will naturally make any examination of his reasoning next to impossible if he does not in fact provide any reasons but simply states a final figure in his determination. In Schedule 2 of the Scheme, the following is provided:

> 4(vi) The Independent Adjudicator shall issue a *non-speaking determination* in writing in relation to the issues in dispute ("Written Determination") ….

38 That the IA shall issue a **non-speaking** determination means that no reasons may be given by the IA for his decision (see *Kendall* (*supra* [36]) at [14.6.1]) which clearly indicates to me that the

parties have contractually agreed to accept that the determination shall be exclusively determined by the expert IA with the intention to severely restrict any supervisory jurisdiction that the courts may have over the IA's decision making process. The expert IA cannot be legally compelled to give reasons unless it is clearly stipulated in his terms of reference and engagement that he has to give reasons for his determination. A non-speaking award is one feature, though by no means conclusive of the character of the determination by the IA being that of an expert determination than an arbitral determination. If it were intended that the determination be subject to close supervisory jurisdiction by the courts, then the contractual scheme agreed to by the parties would certainly not have specifically required the IA to issue a non-speaking determination. This feature contractually adopted by the parties for the IA's determination points once again to the process being an expert determination.

39 I accept the submission of RNA that the wide extent of personal and subjective discretion given to the IA in the Scheme, without being hindered by procedural and evidential niceties, is another piece fitting the jigsaw puzzle that the IA is engaged to act as an expert determiner. What V K Rajah J had enunciated at [35] in *Evergreat* (*supra* [27]) is particularly apposite:

> 35 At the end of the day, the modern distinction between an expert and arbitrator does not lie purely in whether the office holder is performing a judicial, quasi-judicial or purely discretionary function. The essential difference is in the duties and/or functions the terms of appointment impose on an appointee. The labelling of an appointment as "arbitrator" or "expert" is not in itself always conclusive. It is the precise contractual arrangement and the ensuing obligations of the office holder that is, in the final analysis, paramount. Is he obliged to act solely on the evidence before him and the submissions made to him or does he have a discretion to adopt an inquisitorial function? Does he have complete discretion over the applicable rules of procedure? **If he has the sole discretion to arrive at his determination without being hamstrung by procedural and evidential intricacies or niceties, it is most unlikely that the court will view the proceedings to be arbitration proceedings. An expert is permitted to inject into the process his personal expertise and to make his own inquiries without any obligation to seek the parties' views or consult them. An expert is also not obliged to make a decision on the basis of the evidence presented to him. He can act on his subjective opinion; that is the acid test**. [emphasis added]

40 The fact that the Scheme had been sanctioned by the court does not detract from the fact that sanctity of contract lies at the heart of a scheme of arrangement. In considering this very Scheme, the Court of Appeal in *Oriental Insurance* (*supra* [16]) stated (at [67]):

> There is also no reason why the Australian approach cannot embrace the legal concept that a scheme of arrangement which is approved by all the creditors of a company "is wholly a *contractual* scheme"…; the court order sanctioning such a scheme (*ie*, a scheme which is approved by all of the company's creditors) can be seen, in essence, as a *consensual order*. Viewed in this light, the sanctity of contract which lies at the heart of a scheme that has been duly approved by the company's creditors or members is preserved.

41 Besides, there are several other indicators that parties to the Scheme had consensually and contractually adopted the expert determination mode of alternative dispute resolution. First, it bears noting that RNA is a reinsurance company and the participants in the Scheme are mainly insurance companies. The insurance and reinsurance arrangements between the parties are highly technical and specialised. Accordingly, the IA, Mr Law Song Keng, had been specially selected for his expertise and experience as an established and respected figure in the insurance industry to resolve an insurance dispute amongst the insurers and their re-insurer, RNA. From this, it indicates that the IA was chosen

to act more as an expert than an arbitrator under the Scheme. As noted by *Kendall* (*supra* [36]) at [1.1.1], experts are usually chosen for their expertise, knowledge and experience in the subject and issue between the parties:

> Expert determination is a means by which the parties to a contract jointly instruct a third party to decide an issue between them. The third party is now commonly known as an expert, and is a person who has usually been chosen for expertise in the issue between the parties.

42 The finality and binding nature of the decision of the IA which cannot be appealed from to the courts or be submitted to arbitration is a further indication that the nature of the dispute resolution process chosen is not one of arbitration but more an expert determination. The relevant paragraphs expressly providing for the finality of the IA's determination and the exclusion of appeals to the courts are at [14] and [15] above.

43 Accordingly, from the totality of the features enumerated above, I find that the process of dispute resolution by the IA under the Scheme is neither litigation nor arbitration but is broadly a process of expert determination with an express caveat that the IA "*shall act in good faith and with due care and diligence in the interests of the Scheme Creditors as a whole*", which does not in the main take it outside the domain of an expert determination. The fact that the parties may have contractually imposed a duty on the expert to act with due care and diligence in his determination does not, in my judgment, modify the process so drastically to turn it into anything that is substantially different from an expert determination. Although this requirement for the IA to act with due care and diligence does widen slightly the scope of review by the courts, I do not believe it changes the basic character of the expert determination process to be undertaken by the IA in the Scheme as a whole, which the parties have consensually and contractually agreed to. Hence, the general principles of review by the courts for expert determinations remain applicable to the Scheme at hand.

44 I thus accept the submission of RNA that in answering the correct question of quantification of the Scheme claim, the IA is not acting as a judge or an adjudicator. He is performing the role of an expert, which does not involve pure law, but the application of prudent and sound business and insurance judgment, in order to estimate the appropriate amount RNA should pay OIC on account of its contingent claim against RNA under the reinsurance contract, which I believe however must be valued at the **Scheme specified valuation date** rather than the cut-off date. The width of the question formulated for the IA -- to determine the amount of the Scheme claim as at the valuation date, but without any set methodology or other constraints put on the IA apart from having to act in good faith and with due care and diligence in his determination -- implies that the adjudication process adopted and agreed by the parties is that of expert determination.

45 I shall address, later in this judgment, the implications of a valuation by the IA of the contingent claim at the cut-off date instead of the Scheme specified valuation date (see [67] to [82]) on:

(a) whether the IA materially failed to act in accordance with his instructions;

(b) whether there was a manifest error in the IA's determination; and

(c) whether the IA acted without due care and diligence.

At a later part of my judgment at [207] to [222], I shall also deal with the legal effect and impact of the additional requirement and duty on the IA to act with "due care and diligence" on the extent of

the reviewability of the expert determination process by the court.

46 Once it is clear that the principal mode of dispute resolution on the facts of this case is an expert determination, the immediate focus turns next to the available legal grounds upon which the IA's determination can be set aside by the court.

Challenging an expert's determination

47 Under what circumstances can the expert's determination be challenged before the court in the case of a court-sanctioned contractual Scheme? From a review of the authorities below at [48] to [90], I conclude that short of fraud, corruption, collusion, dishonesty, bad faith, bias or the like, the only two main grounds on which this court can set aside the IA's determination are as follows:

(a) where the IA materially departed from his instructions; or

(b) where there is a manifest error in his determination that justly requires judicial intervention.

See *Riduan bin Yusof v Khng Thian Huat* [2005] 2 SLR 188 ("*Riduan*"); *Tan Yeow Khoon v Tan Yeow Tat* [2003] 3 SLR 486 ("*Tan Yeow Khoon*") ; *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256* [2007] 1 SLR 1004 ("*Geowin*") and *Evergreat* (*supra* [27]). As mentioned above, OIC was relying on both grounds.

Material departure from instructions

48 Both counsel cited the following passage from the English Court of Appeal decision in *Jones v Sherwood Computer Services Plc* [1992] 1 WLR 277 at 287:

> On principle, the first step must be to see what the parties have agreed to remit to the expert, this being as Lord Denning MR said in *Campbell v Edwards* [1976] 1 W.L.R 403, 407G, a matter of contract. The next step must be to see what the nature of the mistake was if there is evidence to show that. If the mistake made was that **the expert departed from his instructions in a material respect** – e.g. if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M) v Jones (R.R)* [1971] , the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do so. (emphasis added.)

49 In *Jones (M.) v. Jones (R.R.)* [1971] 1 W.L.R. 840 ("*Jones v Jones*") where the valuer had valued the shares in a company on a break-up basis when he should have used a going concern basis, and as regards certain machinery which the contract required to be valued by an expert valuer selected by him, he had instead valued it himself, Justice Ungoed-Thomas emphasised at p 856 that:

> The authorities thus to my mind establish that, if a valuation is erroneous in principle it is vitiated and cannot be relied upon **even though it is not established that the valuation figure is wrong. [**emphasis added]

50 In *Evergreat* (*supra* [27]), V K Rajah J reviewed the authorities and said:

> 27 ……The starting point for the modern statement on the law relating to experts is to be found in *Campbell v Edwards* [1976] 1 WLR 403, where Lord Denning MR opined at 407:
>
> It is simply the law of contract. If two persons agree that the price of property should be

fixed by [an expert] on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. *Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it*. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything. [emphasis added]

28 In Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co [1978] 1 Lloyd's Rep 175 Lawton LJ said at 181:

> They [the auditors] were to be experts. Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening. What is not acceptable is the risk of the expert being dishonest or corrupt.

29 In the absence of fraud or any corrupt colouring of the IA's determination, there is neither liberty nor latitude to interfere with or rewrite the parties' solemn and considered contractual bargain, see [5]. It is quite inappropriate for a court to substitute its own view on the merits when the parties have already agreed to rely on the expertise of an expert for a final and irrevocable determination.

…..

41 T**he crux of the matter is that if the parties agree to appoint an expert to resolve a dispute, his report or award cannot be challenged unless the expert has departed from his instructions in some material respect.** [emphasis added]

51 The degree of the materiality of the departure from instructions must be considered in the light of the terms of reference or the particular engagement contract of the expert appointed for determining the dispute of the parties. Sometimes, the contract lays down a carefully regulated procedure and sets out in detail how the expert is to carry out his work. But when his departure from instructions or non-compliance with the terms of the determination first comes to light, which may be the first formal document produced by the expert after the departure or non-compliance has occurred, the ultimate effect of that on the parties' position may not be known at that time, or even capable of being forecast with any accuracy, and hence it cannot be necessary or possible to wait until the outcome or effect of the departure or non-compliance is known before being able to decide whether it is sufficiently material to vitiate the expert's act. As Justice Lloyd in *Shell U.K. v. Enterprise Oil* [1999] 2 Lloyd's Law Reports 456 ("*Shell U.K.*") stated at [97] and [98]:

> 97. …..It is therefore a question of assessing materiality by reference not to whether it actually affects the ultimate result, but according to its potential effect on the result and, perhaps even more importantly, on the process, including the ability of the parties to manage and deal with the procedure in accordance with the contract.
>
> 98. I should also say that, **if the expert has committed a material breach of instructions, then as a matter of law the relevant act is not binding on any parties,** leaving aside of course the effect of their subsequent acts. It is not a point on which the Court has discretion whether or not to allow the expert's act to stand. I do not consider that Mr Justice Lightman intended to suggest that there was such a discretion when summarizing the law on *British Shipbuilders v VSEL Consortium plc*,[1997] 1 Lloyds Rep. 106 at p 109 even though he said that the Court "may" set the decision aside. That he did not mean to indicate that it was a discretionary issue appears in any event from the next following sentence. The relevant passage is this:

> If the expert in… his determination fails to comply with any conditions which the agreement requires him to comply with in making his determination, the Court may intervene and set his decision aside. Such determination by the expert as a matter of construction of the agreement is not a determination which the parties agreed should affect the rights and duties of the parties and the court will say so. [emphasis added]

52 The court in *Shell U.K.* set aside the determination, which was held to have been vitiated by the expert's use, in breach of the expert's contract, of the wrong computer mapping package CPS-3 for mapping the contours of strata of rock under the seabed, and was therefore not contractually effective under the agreed procedure set out in the parties' agreement which called for the use of Z-Map Plus. Potentially, different results could emerge from applying the two mapping packages to the same seismic data because the two mapping packages contained functions or algorithms, which were not exactly common to both. The court examined the question of whether the use of the wrong mapping package invalidated the expert's work or deprived it, by itself, of contractual effect and decided that it did: *Shell U.K.* at [90].

53 At [14.5.8], *Kendall* (*supra* [36]) collated some examples of material departures from instructions:

> A fundamental mistake may be one illustration of a material departure from instructions. However, other grounds of material departure from instructions can also provide grounds for challenge, such as an expert failing to use the specified method for testing a cargo of oil, an expert using a different computer mapping package from the one specified in the agreement, an expert valuing machinery when the instructions are to choose and appoint someone else to do the work, or an expert only carrying out part of the task entrusted to him.

54 The materiality of an expert's departure from instructions would undoubtedly depend on the relevant facts and circumstances of each case, and it is to the facts of the present case which we must now turn to understand the nature of the Scheme and the role played by the IA. As a general proposition, so long the expert has answered the question put to him; his determination is binding even if he may have answered it wrongly. As V K Rajah J said at [34] in *Evergreat* (*supra* [27]):

> An expert's decision can be set aside on the basis of fraud or partiality. Beyond that it is probably correct to say that only a breach of an expert's terms of appointment would suffice to set aside his decision. Errors of fact or law will not vitiate an award if the expert acts within his contractual mandate.

55 Similarly, in *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 28 EG 86 it was held that:

> The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. **If he has answered the right question in the wrong way his decision will nevertheless be binding. If he has answered the wrong question, his decision will be a nullity**. [emphasis added]

56 Paul Baker Q.C. said in *Pontsarn Investments Ltd v Kansallis-Osake-Pankki* [1992] 1 E.C.L. R. 148 at 151L-M:

> The fact that he may be patently wrong does not mean that he has not done what he was appointed to do nor that he has asked himself the wrong question. To take any other view would lead to the sort of refined arguments such as have been deployed here and go a long way to emasculate the requirement that the decision of the expert, as a matter of contract between the parties, be final and binding. Thus, the advantage of cost, speed and finality would be seriously diminished.

57 As to when a departure is considered material, Simon Brown LJ in *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 All ER 703 ("*Veba Oil*") gave his views as follows at [26]:

> As Lord Denning MR explained in *Campbell v Edwards*, if an expert makes a mistake whilst carrying his instructions, the parties are nevertheless bound by it for the very good reason that they have agreed to be bound by it. Where, however, the expert departs from his instructions, the position is very different: in those circumstances the parties have not agreed to be bound. … The **test of materiality** devised for identifying vitiating mistakes does not carry across to the quite separate field of departures from instructions. This seems to me so both as a matter of principle and of authority. … ***Once a material departure from instructions is established, the court is not concerned with its effect on the result. ..Given that a material departure vitiates the determination whether or not it affects the result, it could hardly be the effect on the result which determines the materiality of the departure in the first place.*** Rather I would hold **any departure to be material unless it can truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party.** [emphasis added]

Tuckey LJ agreed with the test propounded by Simon Brown LJ above (in bold and underlined) because it was more certain and direct. Tuckey LJ added at [39] that in any event the court would obviously need to consider the subject matter and the express terms of the contract, the nature of the departure and any other relevant facts.

Scheme instructions to the IA

58 RNA had ceased to write new risks and was already running down its business prior to the Scheme. The object of the Scheme, as set out in paragraph 2.1 of the Scheme, was to accelerate that process. To do so, the Scheme employed a process of estimating all present and future claims (including contingent claims) of RNA's creditors before paying out on those claims. The process of estimating and paying out on future contingent liabilities in exchange for releasing RNA from these future ongoing liabilities to achieve a clean break is known as "commutation". The Reinsurance Division of Barlow, Lyde and Gilbert, *Reinsurance Practice and The Law* (1993) explained the process of commutation in greater detail (at [20.6.2]):

> In a true commutation … the reinsured will be paid a sum representing all incurred losses (that is not only losses which he has actually paid but also outstanding losses which have been notified to him and which he will in due course become liable to pay), as well as an amount representing the parties' best *estimate* of the reinsured's liability for losses incurred but not reported (IBNRs). The reinsured will in turn pay to the reinsurer any outstanding premiums which may be due. [emphasis added]
>
> …
>
> In consideration of the fact that the reinsured is being paid a lump sum to commute the contract at an early date, rather than waiting to receive claims payments as and when underlying losses

are paid, the parties will probably agree that the sum paid by the reinsurer to commute his liabilities under contract will be discounted by an amount reflecting an estimate in the decline of the value of money because of inflation, current and projected interest rates, and other similar factors.

59 The complaint of OIC was that the formulation of the issue by the IA materially departed from the Scheme. The question which the IA set out to answer in his determination was expressed thus by him: "*[M]y assessment of the Disputed Scheme Claim from OIC will be based on* ***how a prudent insurer would assess the claims it receives from its insureds****…*" OIC strenuously argued that the IA had asked himself the wrong question. What the IA ought to have done instead was to estimate the liability owed by RNA to OIC on the account of the proceedings in India by considering the strengths and weaknesses of RIL's claim in the Surat court. At the hearing, I directed counsel for OIC to phrase the right question which counsel said the IA should be asking himself. Counsel submitted the IA should have stated: "*[M]y assessment of the Disputed Scheme Claim from OIC will be based on* ***how much RNA should pay OIC in respect of its contract to indemnify OIC against the claim by RIL, currently being prosecuted in the High Court of Surat.***" In other words, the correct question should have been "*What was OIC's likely liability in the Surat action: the subject matter of RNA's indemnity under the contract of reinsurance*?" (See para 108 of OIC's submissions dated 2 Oct 2008.)

60 To recapitulate, the Scheme claim was RNA's obligation to OIC on account of RNA's 38.35% share of the potential full liability that OIC was legally and ultimately exposed to, which the Surat court has yet to determine and award on some future judgment date (with full **pre-judgment** interest running from the date of loss till date of judgment and with further **post-judgment** interest from date of judgment till the date of actual payment) which total judgment sum (principal judgment sum plus interest) is at the moment prospective and unliquidated, for which the IA is tasked to ascertain.

61 I cannot see how counsel's question is materially different from what the IA had set out in his reasoned determination. The IA had said that he was going to assess the claims he had received from RNA, and in the next paragraph (at p 7 of the IA's determination) the IA had in fact set out RIL's claim in detail to show exactly what he was valuing and assessing as follows:

> OIC has submitted a Scheme Claim based totally on RIL's claim against OIC as filed in the Surat Court, India. The total amount claimed by RIL is USD24,251,833.74 plus interest of USD38,064,083.60 plus a continuing interest per year of USD5,092,885.09 from 15 May 2007 till settlement. OIC reinsured 93.35% of the accepted risks to reinsurers. OIC's Scheme Claim, which represent RNA's 38.35% share of the risks accepted by OIC, is USD9,300,578.24 plus interest of USD14,597,576.06 plus continuing interest per year of **USD23,898,154.30**. See Annexes 1 and 2.
>
> (My observation: There is an error in what the IA had stated was RNA's continuing interest claim per year of US$23,898,154.30 (in bold and underlined above for easy reference). The correct amount for the continuing interest per year should have been **US$1,953,121.43.** The IA extracted the wrong figure from the Proof of Debt Form at Annex 2 of his determination. However, I noted that this did not affect the IA's assessment of the value of RNA's claim.)

62 Clearly, the IA was answering the very question which OIC said the IA should be addressing. The IA was paying full attention to the extent of the claim that was filed in the Surat court in India. It was obvious to me that the IA was assessing that claim before the Surat court and valuing that contingent liability specified in the Scheme as a prudent insurer should. For OIC to say that the IA

had asked himself the wrong question in that the IA was not valuing the claim by RIL currently being prosecuted in the High Court of Surat would be to ignore what the IA had clearly stated at p 7 of his determination.

63 The most probative evidence to show that the IA was in fact valuing the Scheme claim based on 38.35% of what the court in India would likely ascertain as the judgment sum flowing from RIL's claim in India was the IA's adoption of the interest rate of 13.5% per annum for the interest and discount computations when valuing the Scheme claim of OIC: see p 22 of the IA's determination. The courts in Singapore certainly are not awarding interest rates of that high order of magnitude for damages suffered from the date of loss or date of writ to the date of judgment to compute the total amount of pre-judgment interest to be included in the final judgment sum. The rate of interest used by the Singapore courts was 6% p.a. for a considerable number of years previously and only recently was that rate changed to 5.88% p.a. The IA was in fact relying on the average of the in-trend interest rates of between 12% to 15% p.a. reported by OIC's legal counsel in India to be reflective of the typical rates of interest used by the courts in India for interest computations up to the date of judgment. If the IA were indeed valuing RIL's claim based on local conditions in Singapore or based on the Scheme as administered in Singapore with no consideration of what the Surat court might award as the interest rate in order to arrive at the total judgment sum in India as at the date of judgment, then the interest rate the IA should be using would have been at 6% p.a. or thereabouts, and quite certainly no where near the interest rate of 13.5% p.a. that the IA had in fact used. Second, the IA all the while had in mind whether to allow the starting point of the interest payment to commence "*from date of court filing by RIL*" in India or at some later date because of RIL's contribution to the delays: see p 21 of the IA's determination. The date of the court filing in India can only be relevant if the IA had in mind the valuation of RIL's claim as filed in India and with full regard to what the Surat court may award as the final judgment sum (inclusive of pre-judgment interest on the principal amount of the loss commencing also from the date of the writ provided RIL cannot be faulted in anyway for delaying the court proceedings unreasonably). Otherwise, there would be no need for the IA to consider when RIL had filed the writ in India in order for the IA to ascertain the starting date on which the interest of 13.5% p.a. was to run.

64 In my view, OIC's contention that the IA had asked himself the wrong question was an unmeritorious one. The IA had carried out his mandate in accordance with the Scheme, *viz* to make a best estimate of the quantum of OIC's liability based on what the Surat court in India might likely award as the total judgment sum (principal plus interest) on RIL's claim. It was significant that although the IA was not limited to any particular methodology himself and neither was he compelled to take into account and adopt any particular facts, nevertheless the record of the IA's deliberations showed that the IA was fully cognisant of the Surat proceedings and was clearly mindful of the effect and relevance of those proceedings to the valuation of OIC's Scheme claim. In fact, the IA had specifically raised several queries with OIC as follows (see the affidavit of Simon Neale Birch ("*Birch*") dated 10 June 2008 at pp 239 and 242):

> In submitting its Proof of Debt to the Scheme Manager, Oriental Insurance (Oriental) has expressed that it anticipated the assured to prevail in Court in its claim. What is the basis for such anticipation?
>
> …
>
> The Assured has sued both Oriental and the owners of the vessel "Emerald Sky" which collided with the Buoy. If the Assured win its case in Surat Court against both Oriental and the vessel owners, can it be expected that the cost of the Assured's claim against Oriental will be reduced to the extent the Assured is already compensated by the vessel owners? Is the Assured's claim

against Oriental fully included in its claim against the vessel owners? If not, to what extent is it included?

OIC duly submitted a written reply to these queries. Accordingly, the IA had considered the very issue which OIC now asserts the IA ought to have considered. The IA cannot be faulted in this regard.

65 The IA had also listed the following issues which he said had been raised in the case for his consideration:

(a) What should be expected of the claimant in complying with the terms and conditions of an insurance contract for adjudication under the Scheme?

(b) What should be the approach used in ascertaining a Scheme claim submitted by a primary insurer against its reinsurer when the insurer has been sued by its insured in court for a claim involving the reinsurer and the case is still pending?

(c) What should be the standard of proof of claim required of the Scheme creditor in such a situation?

(d) What should be considered relevant factors and necessary conditions in meeting this standard?

66 The IA was also fully aware of his duties (which included that of acting with due care and diligence) and his responsibilities as the IA to estimate, quantify and value the future liabilities of RNA to its Scheme creditors. The IA said that he had observed principles of law pertaining to insurance contracts, as well as industry best practices. In his determination he said:

> This adjudication has to be done in accordance with the terms of the Scheme as sanctioned by the Court. Although wide discretion is granted to the IA, the IA is required to carry out his duty and responsibility in good faith and due diligence and with complete independence.
>
> Beside the Scheme, there are principles of law to follow, in particular as they pertain to insurance contracts. And there are industry best practices for insurance business to observe so far as the claim settlement process is concerned. In practice, good judgement is often necessary to ensure the claim settlement is fair and equitable to the parties concerned, given the circumstances governing the case. As the IA, I intend to observe this framework in this adjudication.
>
> …
>
> My assessment of the Disputed Scheme Claim from OIC will be based on how a prudent insurer would assess the claims it receives from its insureds and assuming that the insurer has a policy of fair treatment of its insureds in the area of claims settlement.

Correct valuation date is 19 September 2006

67 Paragraph 4.4 of the Scheme states that "*the amount of the Scheme Claim of that Scheme Creditor shall be determined by the Independent Adjudicator*". This is the principal instruction to the IA. The Scheme defines "Scheme Claim" to mean the total amount of RNA's liabilities "as at the Valuation Date" to that Scheme creditor (*i.e.* RIL in this case) under or in connection with any insurance contract or reinsurance contract. The "Valuation Date" is then also defined in the Scheme as follows:

> ***Valuation Date*** means is (*sic*) shown as **19 September 2006** and defined in the Scheme Claim definition as "the total amount of the Liabilities (including any Liabilities that had been agreed between the Company and the respective Scheme Creditor but had not paid prior to the Valuation Date)". [emphasis added]

68 Paragraph 2.2 in Schedule 1 "GUIDELINE TO IBNR METHODOLOGY" of the Scheme further reinforces the irrefragable fact that the relevant date to value all agreed claims, notified outstanding claims as well as IBNR claims is **19 September 2006** and not the cut-off date that the IA had adopted:

> **2.2 Assessment of amounts due to each Scheme Creditor**
>
> As part of the procedure for submitting claims under the Scheme, Scheme Creditors will be asked to provide, on a Proof of Debt Form, **agreed claim** and **notified outstanding claim** figures that they believe have been advised to or are due from the Company **as at 19 September 2006.** Scheme Creditors will also be asked to provide their estimate of **IBNR claims**, if any, on an *undiscounted* basis (i.e. without taking account of the time value of money) as **at 19 September 2006.** [emphasis added]

69 The claims cut-off date of 14 May 2007 is only relevant in so far as it sets the deadline to submit proofs of debt under the Scheme and to deem the value of claims submitted after the cut-off date to be zero in value: see paragraph 3 of the Scheme. The cut-off date therefore has no relevance whatsoever to the reference date for assessing, quantifying or valuing the Scheme claims that have been submitted prior to the cut-off date (and in this case, also to OIC's Scheme claim that was allowed to be submitted after the cut-off date by the Court of Appeal).

70 It is no business of the court to enquire why the parties have chosen 19 September 2006 as the reference valuation date to value the Scheme claims and not the cut-off date of 14 May 2007. The IA should be using the correct valuation date as instructed.

71 I can without hesitation state that valuing the Scheme claim as at the cut-off date of 14 May 2007 constitutes a material departure from instructions. On a proper interpretation of the Scheme documents, it is beyond peradventure that was not what the parties to the Scheme had intended and contractually tasked the IA to perform. The parties had expressly directed the IA to value the contingent liability as at the valuation date of 19 September 2006 in the Scheme documents and at no other date. The Scheme documents admit of no other possible reasonable interpretation of what is the relevant valuation date contractually agreed by the parties under the Scheme. If this requirement to use the valuation date as specified in the Scheme is not adhered to, it seems to me that the determination must be set aside as a nullity. The IA can be said to have asked himself the wrong question, and it is irrelevant that the IA may have answered that wrong question correctly. That the valuation amount ascertained may have been correct will not bring that IA's valuation within his mandate if he has answered the wrong question, which was never asked of him in the first place.

72 Imagine for the moment as an analogy that a house purchaser is interested in buying the house in 2008 and has asked a professional valuer to value a particular house that he intends to purchase as at the year 2008. Suppose the valuer decides instead to value the house as at a different year 1998 and he subsequently provides the house purchaser with his valuation for 1998 and not 2008 as instructed by the house purchaser. I doubt very much that the house purchaser will be happy to pay the valuer his valuation fees even though the valuation of the house may have been accurate for 1998. Even if the valuation amount for the correct year 2008 happens to turn out to be the same as what the valuer had earlier given for the valuation for the year 1998 (*e.g.* where the property market

in 2008 has fallen to the same level as 1998), it is of scant consolation to the house purchaser. I believe the house purchaser will still reject that 1998 valuation because that was not what he had asked the valuer to value.

73 A failure to adhere to instructions, by going beyond the IA's mandate to value a Scheme claim only as at the Scheme specified valuation date of 19 September 2006 and as at no other date, naturally results in a lack of jurisdiction on the part of the IA. There is in principle no need for me to consider if that act of materially departing from instructions also amounts to a manifest error as that is a relevant question for consideration only if the IA had acted within his mandate and had adhered to his instructions but unfortunately had committed an error when answering the right questions asked of him. If the departure from instructions **assessed with respect to the instructions** (and not the ultimate outcome) is material, then the IA's determination must be set aside as it is a nullity.

74 Generally, the court will not proceed to determine whether the material departure, once established, will affect the outcome or will affect the outcome in a material way as an additional criterion to be satisfied before setting aside the IA's determination on the ground of a material departure from instructions.

75 The authorities I have reviewed above (*Shell U.K.* (*supra* [51]) at [97], *Jones v Jones* (*supra* [49]) at p 856 and *Veba Oil* (*supra* [57]) at [26]) indicate that even if the material departure is shown not to affect the final outcome or the final quantification, the IA's determination nevertheless will still have to be set aside as that was not the bargain entered into by the parties. If the non-conformance with instructions also materially affects the final outcome as in this case, then *a fortiori*, it must be set aside. In this case, I have ascertained that the use of the wrong valuation date has also made a significant quantitative impact on the interest/discount computations and has therefore affected the correct amount of the total award (*i.e.* principal and interest) as can be see at [82].

76 However, counsel for both parties did not make submissions on this issue of the correct date for valuation of the contingent liability of RNA to OIC. Perhaps the parties, in particular OIC, may not have seen the relevance of the point or may have overlooked it. OIC may not have realised that the IA had in fact valued the contingent liability on the wrong date. The significance of that mistake or its impact on the ultimate valuation of the total contingent liability may have escaped OIC.

77 I do not wish to delay the delivery of this judgment by inviting counsel to make further submissions to me on this point concerning the wrong valuation date and the effect on the outcome as I am already able to set aside the final award of US$3,840,584 on other grounds. Substantively, the IA will have the opportunity to correct himself and save the time, effort and cost of the parties in the process.

78 Unless it is positively shown that OIC is fully aware of the wrong valuation date since the delivery of the IA's determination, and unless OIC has fully understood and appreciated what it means to value a contingent claim as at a different date and has itself not been mistaken that the correct date under the Scheme to determine the valuation is 19 September 2006 and not 14 May 2007, and unless OIC with such full knowledge, has taken no objection to this, RNA cannot possibly argue now that OIC has made an informed concession on this point or has affirmed it or should be held at law to have elected to affirm the departure from instructions or the breach of the terms of reference by the IA to value the Scheme claim on a different basis *i.e.* on a different date from that specified in the Scheme. Here is a non-contractual tender of performance by the IA who valued the Scheme claim on a date different from what he was instructed. If with knowledge of the facts giving rise to a right to reject that non-contractual performance and having an informed choice to do so, OIC nevertheless unequivocally elects not to do so, its election shall be final and binding upon it and it will be treated in

law as having waived its right to reject the tender of performance by the IA as non-contractual and a material departure from instructions.

79 But it is too late for RNA to take the point that OIC had been content to waive or affirm this material departure from instructions. Similarly, it is too late for OIC now to argue that valuation on the wrong date is a material departure from instructions and the determination a nullity. It would appear that both parties had not realised or foreseen this point.

80 Since I have not notified counsel for the two parties of this issue and have not invited them to submit on it, I do not consider it appropriate for the purpose of this judgment (a) to set aside the IA's determination on the ground that the IA had materially departed from his instructions by assessing the contingent liability with respect to the cut-off date (*i.e.* 14 May 2007) and not the valuation date as prescribed in the Scheme (*i.e.* 19 September 2006); and (b) to remit to the IA for his re-determination because this material departure from instructions had made his earlier determination a nullity. Having given both counsel no opportunity to argue this issue, it will also be a breach of natural justice and wrong of me simply to set aside the whole determination on the ground that the IA had valued OIC's Scheme claim on a date different from what was instructed of him and which in this case has also very materially affected the outcome as can be seen in [82] below.

81 However, since I am already remitting the case to the IA for his re-determination of the valuation on another ground of "manifest error" (see [223]), the IA can use this second chance to remedy at the same time, the fundamental error of the wrong valuation date which goes to his jurisdiction and mandate. On a practical level, I think this will avoid a lot of inconvenience, wasted time, effort and cost, if this matter is brought to the attention of the IA. If the IA does not address this issue of the wrong valuation date in his re-determination, another costly and time consuming reference to the court to review the IA's decision may again arise. Not only will the court's resources be unnecessarily expended on reviewing the IA's decision a second time, so will the parties' resources in making or resisting the second review application. It is for these very reasons that I have taken the trouble in this judgment to provide detailed guidance on this issue and also on several other issues pertaining to the discount and the post-award interest, and at the same time, to demonstrate the extent of the impact on the final valuation sum arising out of the fundamental deviation from the specified valuation date. In the two Annexes to this judgment, I have shown how the discount calculations and a re-valuation to the correct valuation date can be readily done. Fortunately in this case, any difference in the exchange rate of US$ to INR between the two dates – 19 September 2006 and 14 May 2007 -- does not affect the IA's computation of the principal sum of US$3,176,168 (before interest) because the experts, IMODCO and Dolan, had quoted the estimated repair costs in US$ and not in INR, and the IA had used those estimated repair costs quoted in US$ to make an assessment of the repair costs in US$ in his determination. Had the estimated repair costs been provided in INR by IMODCO and Dolan, then adjustments would have to be made to the principal sum on account of the exchange rate differences between the two dates.

82 Based on the **same** principal sum of the repair costs at US$3,176,168 (before interest) as ascertained by the IA, the difference in the valuation results based on my calculations (in the two Annexes) is significant: it amounts to US$5,615,453 (Valuation as at 14 May 2007, the cut-off date) – US$5,160,890 (Valuation as at 19 September 2006, the Scheme specified valuation date) = **US$454,563.**

Difference between material departure from instructions and manifest errors

83 What is the difference between a material departure from instructions and a manifest error in an expert determination and what are the legal consequences flowing from each of them? Simon Brown

LJ in *Veba Oil* (*supra* [57]) succinctly differentiated between an error/mistake and a departure from instructions at [26]:

> 26…(i) A mistake is one thing; a departure from instructions quite another. A mistake is made when an expert goes wrong in the course of carrying out his instructions. The difference between that and an expert not carrying out his instructions is obvious.

84 Once it is shown to be a case of a material departure from instructions, it is immaterial whether or not the result is affected in a significant way by that departure. The determination must be set aside. Unless the departure can truly be characterised as trivial or *de minimis* **when analysed with respect to the instructions** (and not so much with respect to the quantum or the end result of the final determination), a departure from instructions must generally be regarded as material, and that end result, even if shown not to be significantly different, must accordingly still be set aside as it is a nullity and not binding. Hence, once there is a material departure from instructions, there is generally no need to consider if that material departure constitutes at the same time a manifest error, or as in this case, also whether it amounted to an act of the IA that is lacking in due care and attention. The expert determination is simply no longer binding as the court in *Veba Oil* (*supra* [57]) had observed as follows at [34]:

> If, of course, the error consists of a departure from instructions, then, … it will never be necessary to ask whether in addition that error amounts to a 'manifest error': it will vitiate the determination in any event.

85 Apart from fraud, corruption, collusion, dishonesty, bad faith, partiality and the like, an expert who does not decide the actual issues referred to him in accordance with his terms of reference or his instructions will have made a decision outside his mandate and jurisdiction and his decision is a nullity. But if he does so, then his decision is binding even if he made errors provided those errors do not amount to **manifest** errors. Where the expert has not carried out the determination according to the specified methodology (*e.g.* in testing, sampling or valuing as at a specified date), then he has not done his job in accordance with his instructions and hence the parties have not agreed to be bound by the result. This is far more fundamental than a failure in relation to a procedural matter, which is ancillary to the determination itself. Hence, a material departure from instructions affects the very nature of the assessment which he, as the expert determiner, has been entrusted with and is supposed to have carried out. This is no longer a case of answering the right question in the wrong way because the expert has effectively performed a task different from what the parties had asked him to do. He has failed to act within his terms of reference and do what he was appointed to do. Even if the departure from instructions were to have no impact on the ultimate outcome, it must still be set aside when it is a material failure to follow instructions. The materiality here is evaluated with respect to the instructions, mandate, the contractual terms of the expert's engagement for the expert determination and the terms of reference as set out in that agreement. Of course, if the non-conformance with instructions has also materially affected the final outcome as in this case, then *a fortiori*, it must be set aside.

86 On the other hand, in determining whether a manifest error has occurred, the materiality and impact of the error in answering the right question in the wrong way on the ultimate outcome will become relevant, unlike a case involving a material departure from instructions. If the impact on the final outcome is trivial, then the court will have the discretion not to set aside the award for a manifest mistake or error that leads to no significant difference in the outcome. Where any outcome is materially impacted by a manifest error, then there will be prejudice to the party adversely affected by that error and the normal course is to remit the matter to the expert determiner for a re-determination and to correct the manifest error accordingly.

Manifest errors

87 The Court of Appeal in *Riduan* (*supra* [47]) had accepted Choo Han Teck J's holding in *Tan Yeow Khoon* (*supra* [47]) that a party may challenge an expert's valuation if "there is a manifest error that justly requires judicial intervention." This notion of "manifest error" has also been interpreted by V K Rajah J in *Geowin* (*supra* [47]) at [16] – [18] to be "a patent error on the 'face' of the award or decision" where the court "does not stray beyond the actual report or award in considering how or why the decision was reached." After reviewing several Commonwealth authorities, V K Rajah J further opined (at [17] and [19]) that:

> 17 The courts in England and Australia have consistently taken the view that in such situations, even if an expert is wrong or muddle-headed the parties cannot complain (see [7] above). The real reason for this stance is that the parties have contractually agreed to accept the decision of the expert – *a fortiori* if it is expressly provided that the decision of the expert is to be "final". The courts have, however, reserved the right to "correct" an expert's decision in a speaking award if it can be shown to be the result of an error on the face of the award. Lord Denning MR in *Campbell v Edwards*, at 407, made the following incisive observations:
>
> > It may be that if a valuer gives a speaking valuation – if he gives his reasons or his calculations – and you can show *on the face of them* that they are wrong it might be upset. But this is not such a case. Chestertons simply gave the figure. Having given it honestly, it is binding on the parties. *It is no good for either party to say that it is incorrect*. [emphasis added]
>
> …
>
> 19 If the parties agree that an expert's decision is final, a court should not inquire (in the absence of a charge of fraud or collusion):
>
> (a) how a decision has been reached;
>
> (b) into the basis for the decision; or
>
> (c) whether the decision was indeed correct.
>
> To do so would be entirely contrary to the parties' contractual intentions to be bound by an expert's decision – particularly if the agreement itself expressly stipulates that the decision of the expert is final. I respectfully concur with Lord Denning MR's view in *Campbell v Edwards* ([16] *supra*) that the only errors that can be corrected by the court are those that appear on the "face" of the award or report (see at [17] above). In the context of a speaking award, the court should not stray beyond the actual report or award in considering how or why the decision was reached. The underlying evidence ought not to be re-examined or referred to as this would be tantamount to an appellate hearing and to that extent contrary to what the parties had solemnly agreed to. The right of review should be confined to correcting apparent mistakes that appear on the face of the report or award (*eg apparent mathematical miscalculations*) and to determining whether the expert has complied with his terms of appointment.

88 On the facts of this case, fortunately the IA gave a reasoned determination and even included the relevant important documentary evidence as part of his written determination which then enabled me to see more clearly and better understand, both from the IA's reasoned determination and the attached documentary evidence forming part of his written determination, as to where and how the

manifest errors as contended by OIC could have arisen.

89 What if the manifest error is not detectable unless the underlying evidence is referred to? What if the parties themselves put forward the underlying evidence before the court for consideration? Should the court completely ignore such underlying evidence? Is such evidence also not a part of the "record" simply because they are not attached to the expert determination? Must the court confine itself only to the four corners of the written expert determination when reviewing that determination on the question of a manifest error? In this case, I had no alternative but to depart respectfully from what Rajah J had said in relation to not examining the underlying evidence at all, as I would not have been able to understand fully how the IA had determined the case and follow his reasoning if I could not examine the insurance policies, the provisions in the Scheme documents and various other exhibits in the affidavits filed in support of the case, which included many of the documents/letters constituting the underlying evidence that were earlier placed before the IA.

90 At [33], the court in *Veba Oil* (*supra* [57]) considered what else could constitute "manifest errors":

> 33 ….I would extend the 'definition' of manifest errors as follows: "oversights and blunders so obvious *and obviously capable of affecting the determination as to admit of no difference of opinion*". [emphasis added]

Hence, manifest errors include errors which are "obviously capable of affecting the outcome of the determination" and "admit of no difference of opinion". Usual errors that qualify as manifest errors are mathematical miscalculations in the determination *e.g.* 2 + 2 = 5.

91 OIC raised two areas where alleged manifest errors had been made in this case: (i) the IA's ruling that the SPM was not a CTL as defined under the insurance contract between OIC and RIL; and (ii) the IA's basis for awarding interest for 4.5 years, discounting it by 3 years and allowing only 1.5 years of interest. I shall now deal with them.

Constructive Total Loss: CTL

92 In determining whether there was a CTL, the IA was required to determine whether the cost of repairing the SPM would exceed the agreed insured value. For this purpose, the IA considered the following expert reports:

(a) Loss adjusters, Matthews Daniels;

(b) IMODCO, the manufacturer of the SPM;

(c) James Dolan, maritime expert;

(d) James Petts, maritime expert;

(e) America Bureau of Shipping; and

(f) Various ship repairers invited by RIL to tender for repairs.

93 After reading the various reports from the experts as set out in the award, it became clear why the experts had to make various assumptions because the SPM, and the Multi-Production Distribution Unit ("MPDU") and the Rotating Assembly within, had not been stripped down for tests, inspection and detailed evaluation of the extent of the damage to the interior of the SPM and the MPDU. Due to the

incomplete information available, only preliminary cost estimates were given in US dollars with various assumptions and qualifications made on the reparability of the SPM. This lack of full information spawned the many divergent and differing views and opinions from the various experts, each making their own assumptions and qualifications which resulted in widely differing estimates of repair costs and differing views on the economic viability of repairing the SPM to a comparable condition to that existing prior to the incident.

94 The IA rightly observed in his determination that there were many views and opinions rendered before him on the question whether the SPM was a CTL, but they did not all carry the same weight. The IA decided to rely on the reports of IMODCO because it was the original manufacturer of the SPM and that of James Dolan because of his outstanding credentials and experience and the fact that Dolan had carried out a complete visual inspection of the SPM including the chambers and produced the field survey detailing the damages and his recommendations for repair together with the repair specifications for the repairer to comply. Having regard to the cogent reasons given, the IA cannot be faulted for relying only on these two main sources for his broad estimate of the repair costs. The IA assessed the repair costs of the SPM by taking the average of four repair estimates, each based on different assumptions and permutations on how the repair should be done, which it is not necessary to set out here. The four estimates comprised of two from Dolan (*i.e.* US$3,484,864***and US$4,635,346) and two from IMODCO (*i.e.*US$12,178,983 and US$13,122,428). The IA then compared that average of the 4 values (*i.e.* US$8,355,405) against the agreed insured value of INR517,500,000**(*i.e.* US$12,652,812 based on the exchange rate of US$1 = INR40.9 as at 14 May 2007 for the agreed insured value of INR 517,500,000) and concluded that the SPM was not a CTL. After allowing for the deductible of INR3,000,000**(or US$73,350 at the same exchange rate of US$1 = INR40.9) for any one accident or occurrence (applicable under the policy only if it was not a CTL for which the loss was to be payable in full), the IA ascertained the value of the claim to be US$8,282,055 (ignoring the interest component for the time being). As RNA's share of this claim item on the SPM is 38.35% of US$8,282,055, **the principal value of the Scheme claim before any claim for interest loss is thus US$3,176,168.**

(**NOTE 1: At the re-determination, if the IA decides to value the Scheme claim on 19 September 2006 instead of 14 May 2007, then it is necessary to apply the exchange rate on 19 September 2006 and not the exchange rate on 14 May 2007 to re-compute the agreed insured value of the SPM in US dollars to determine if the CTL conclusion remains valid. The deductible must also be converted to US dollars at the exchange rate on 19 September 2006 rate to see what adjustments, if any, are required for the deductible.

***NOTE 2: There is a small error here in the averaging computation by the IA at p 16 of his determination as the figure of US$3,484,864 should have been US$3,484,846 based on the breakdown of the cost estimates proved at p 15 of his determination. The IA may wish to correct this at his re-determination.)

95 OIC's objection to this was that Dolan's report was premised on the assumption that the SPM could be repaired in designated repair yards in India. OIC asserted that the designated yards had turned down such an offer and it would be impossible to prove before the Surat court that repairs could be carried out in India as these yards would give contrary evidence.

96 I first observe that the IA was fully cognisant of the fact that IMODCO and Dolan had diametrically opposed views as to whether the repairs could be done in India: see p 15 of the IA's determination. Further, the IA recorded at p 13 of his determination that the *majority* of the ship repairers invited by RIL to tender for repairs were of the view that it was not economically or technically feasible to repair. That meant that there remained a minority of the ship repairers that

were of the view that it was economically or technically feasible to repair the SPM in their yard. In any event, it was emphatically not for this court to scrutinise the underlying evidence **in detail** in this review of the IA's determination otherwise it would be tantamount to an appellate re-hearing of the matter. A review of the parties' submissions before the IA showed that OIC was now simply rehashing the same arguments it had raised before the IA. It might well be that the evidence would show that all the Indian ship repairers were of the common view that repairs were not economically or technically feasible. However it is not this court's role to decide whether, on the evidence, the IA was justified in relying in part on the estimates provided by Dolan. OIC had never challenged Dolan's expertise and competence as a maritime expert who was well qualified to give expert evidence on the cost of repairs to the SPM.

97 By averaging, the IA had effectively given the diametrically opposite views of Dolan and IMODCO equal *weightage*. This was a matter eminently within the purview, discretion and judgment of the IA. This objection raised by OIC was patently not a manifest error that justly required judicial intervention. It fell squarely within the type of error (even assuming it was one) which this court would not intervene in light of the parties' agreement that the determination shall be final and binding. Similarly, the fact that the IA had taken an *average* of the four repair estimates could not be regarded as a manifest error that required the court's intervention. It was certainly well within the purview and expertise of the IA, as an expert determiner carrying out an exercise that was within his competence, jurisdiction and mandate under the contractual Scheme, to consider in the light of the various probabilities, uncertainties and contingencies (*e.g. whether or not the SPM could be repaired in India given the paucity of evidence on (a) the extent and nature of the internal damage to the SPM; (b) the actual engineering capabilities of the various shipyards in India that could undertake such a repair; and (c) the degree of complexity of the repair, all of which were not entirely clear*), that the average of the four repair estimates would, in the IA's honest view, after due care and consideration, be the proper approach to adopt in assessing whether there was CTL, and consequently, the appropriate monetary amount to use as an estimate of the probable repair costs for the purpose of computing the commutation amount of that contingent liability. The fact that the IA had decided to take an average of the four estimates does not *per se* mean that he had not taken due care and consideration especially when there is nothing to show that such a methodology is obviously flawed or that the IA had fallen into manifest error given the circumstances and the state of the evidence available to him for his consideration.

98 Being a matter which is properly and entirely within the mandate given to the IA for his expert determination and which involves an application of his expertise in the insurance industry, his expert judgment and evaluation, I decline to intervene and set aside the amount of US$3,176,168 arrived at by the IA as the adjusted principal claim amount for the repair costs after deductibles but before interest. This ground of manifest error was not made out by OIC on the issue of CTL. There was nothing before me to show that the IA in his determination was not seeking to reflect the relative probability and extent of liability that OIC was facing in India, including the possibility that the Dolan report might be accepted entirely in the Indian courts, instead of IMODCO, and *vice versa*.

99 The process of averaging itself suggests to me that the IA viewed that all four modes of repairs were equally probable given the limited information available. Under the circumstances, the IA was perfectly entitled to ascribe equal probability to each of the four possible modes of repair envisaged by IMODCO and Dolan, and then take the average of the four repair cost estimates to reflect their equal probabilities. With no stripping down of the SPM for an invasive inspection to be carried out to provide more accurate information on the damage and the probable repair costs, a probability assessment by the IA that a particular repair mode out of the four repair modes was far more probable than the rest and therefore the repair cost estimate for that particular repair mode should be adopted, would not only be difficult but might be without basis and not justifiable given the

uncertainties and the lack of more detailed information.

100 On the materials placed before me, I can see nothing that was close to being a manifest error committed by the IA in his methodology of estimating the probable repair cost. While the averaging may appear as a mechanistic approach, but embedded within that averaging process and methodology is an assessment of equal probability of each occurrence by the IA, which he is entitled to make. Further, the IA's decision to select only the estimates provided by IMODCO and Dolan and his use of the averaging methodology cannot be impeached in my view. There is no error to speak of, let alone an error that admits of "no difference of opinion". I do not accept the submission of OIC that there will be no manifest error only when the IA considers the issue of CTL solely on the basis of the IMODCO report and that the Dolan report should be completely discarded by the IA.

101 Accordingly, I am not interfering with the IA's ascertainment of RNA's share of the principal amount of the claim of **US$3,176,168 excluding interest.**

102 It also bears reiterating that the adjudication framework under the Scheme does not dictate to the IA any parameters or guidelines to consider in quantifying the Scheme claim. The IA's discretion to select the methodology to assess the loss has not been fettered in any way. The IA is left to apply his specialised knowledge, technical and actuarial expertise to best assess the dispute at hand and to adopt his own methodology in quantifying the Scheme claim. The IA may of course consider the submissions from the parties, but the Scheme does not oblige the IA to act solely on or be fettered by the submissions before him.

Deduction of 3 years of interest on account of RIL's contribution to the delay

103 In the absence of any fault for causing delay in instituting and prosecuting legal proceedings against OIC on the part of RIL in India, the pre-judgment interest on the principal sum claimed should normally commence at least from the date the writ was filed on 27 October 1999 in the action before the Surat court, if not from the date of the actual accident and loss of the SPM, which was on 12 October 1998, about a year earlier than the date of the filing of the writ.

104 What is in issue between the parties concerns the determination of the total quantum of interest. The IA decided to award interest only for a period of 4.5 years **prior** to the cut-off date of 14 May 2007. **Accordingly, the IA had determined the starting date for the accrual of interest to be 14 November 2002** on the basis that the delays in part were caused by the insured RIL, who had acted unreasonably in not making the SPM available for an invasive survey. In the IA's view, it was not reasonable on account of the delays to allow payment of interest for the full period from the date of filing of the writ by RIL (*i.e*. 27 October 1999) to the cut-off date which would have been for a period of 7.5 years. OIC contended that the IA made a manifest error in deducting 3 years from this 7.5 years, thus allowing only 4.5 years of interest prior to the cut-off date, in order to penalise RIL for its culpable behaviour in contributing to the delay in the proceedings in India. OIC submitted that it was a manifest error for three principal reasons:

(a) RIL did not prevent RNA from carrying out an invasive inspection. The inspection was not carried out because RNA refused to foot the cost for such an inspection that RNA wanted itself. Obviously, if RNA wanted the inspection done, they would have to pay for it and RIL would make the SPM available to the inspectors appointed and paid for by RNA itself. RNA must not lay the blame for any delay arising out of the issue of the inspection on RIL.

(b) Since the IA had decided that the SPM was not a CTL and could be repaired, the issue of inspection was irrelevant. The claim in this regard would be confined to costs of repairs and RIL

would be compensated by any court for the full extent of interest that had accrued since October 1999 up to the cut-off date of 14 May 2007.

(c) The IA did not have any knowledge of Indian law and did not cite any opinion in support for his conclusion.

105 On the other hand, RNA submitted that the IA took into account RIL's conduct in contributing to the delays in the Indian proceedings by persistently denying OIC and the other underwriters access in India to the damaged SPM for the purposes of inspection. On account of these delays, the IA awarded OIC only 4.5 years of interest prior to the Scheme's cut-off date of 14 May 2007. RNA contended that the IA's findings on delay and interest were a completely rational exercise of his discretion and an application of his experience in valuing OIC's claim. It reiterated that the role of the IA was that of an expert who was commutating OIC's claim and was not a proxy for an Indian court awarding interest in favour of RIL in the Indian proceedings. OIC further argued that in any event, even if RIL was in a court of law, it would not be entitled to interest as of right and it would remain a matter of discretion for the court.

106 The IA had to sieve through and interpret the purport of various letters exchanged between RIL, OIC and RNA and consider all the evidence before determining as a fact that RIL had contributed to the delay. To better ascertain the nature and full extent of the damage, the repairs needed and the repair costs in order to determine whether the SPM was a CTL, a detailed joint internal inspection requiring dismantling of the SPM and the MPDU within was required and had to be paid for. The invasive inspection was going to be costly. The place where this invasive inspection could be done and the availability of the requisite facilities for inspection and testing equipment *e.g.* for pressure testing, had to be established. There were also safety issues to be resolved.

107 Clearly, cooperation from all parties was needed to expeditiously move the whole process of investigative fact finding by the experts and evidence collation for the litigation in India. If any party involved in the process (including RIL) had been less than cooperative or had been putting obstacles in the way or had been unnecessarily difficult or unreasonable, it would not be manifestly erroneous for the IA to conclude as a fact that RIL had contributed to the delay in moving the claim forward in India.

108 Counsel for OIC appeared to limit the cause of the delay to the disagreement over who should, under the policy, first bear the cost of the detailed joint inspection, survey, dismantling and stripping down of the SPM and MPDU in establishing the claim. Granted that the issue of who was to first bear the cost of the invasive inspection was a major cause of the deadlock amongst the parties and a major cause of delay, it was however not the only matter that the IA had to consider. In fact, there were a whole host of other issues in relation to the delays. The cost of the invasive inspection was merely one of them. The IA was entitled to evaluate all the evidence to come to the conclusion that he did. I am not minded to interfere with his fact finding here and I can see no manifest error or any lack of due care and diligence in his evaluation of the evidence.

109 I further noted in the document titled "REINSURERS' PROPOSED PROTOCOL FOR FURTHER INSPECTION OF SPM BUOY "HAZIRA" dated June 14, 2001" at p 4 that RNA, as the reinsurers, had taken the view that under the policy of insurance and applicable law, it was the responsibility of RIL, the assured, to demonstrate damage and the extent of the loss. Accordingly, all costs for the invasive inspection, **should in the first instance**, be borne by RIL and only thereafter submitted for consideration by the underwriters for reimbursement as part of a properly documented claim subject to policy terms and conditions. Having regard to what RNA had said, there is indeed some sound basis for the IA to take the view that RIL (the assured) had in part contributed to the delay and hence, it

is not manifestly wrong for the IA to evaluate that the court in India may also exercise its discretion to penalise RIL (the plaintiff in the suit in India) by reducing the period of interest, in that, the start date for the interest to run is to be on a date later than the date of the writ because the actions of RIL (the plaintiff in the Indian suit) had contributed to the long delay in moving the claim forward in India. In RIL's letter dated 23 August 2001, RIL had clearly refused to bear the cost of the invasive inspection and had asked OIC to foot the entire expenses for the inspection instead, even though under the insurance policy it was RIL who had to properly document the extent of its claim which in turn would have necessitated an invasive inspection.

110 I further noted that para 24 of the affidavit of Niraj Kumar filed on 4 June 2008 in support of OIC's application states as follows:

> RNA insisted that it wanted the Multi Purpose Distribution Unit ("MPDU") to be inspected before determining whether the SPM was indeed a CTL**. Initially the insured did not see the need for the inspection but finally relented** but **insisted that the costs of inspection amounting to US$330,000 ought to be borne by RNA**. This led to an impasse which remains unresolved to-date." (Emphasis added.)

This above words underlined in bold indicated to me that OIC itself had conceded that RIL (the plaintiff in the Indian suit) had not been very cooperative from the start with regard to the process of bearing the costs of the invasive inspection first in order to quantify the damage/loss and present its claim more accurately for its insurer OIC to assess properly the assured's claim. The evidence cited above shows that RIL had not been entirely cooperative. Indeed if RIL had been cooperative and had not in any way contributed to the delay, the IA might well have allowed the interest period to start running earlier from the date of loss in October 1998 or the date of writ in India in October 1999. In effect, the IA was basically also factoring into his assessment whether the Surat court in India would be deducting some years off from the interest period for the same reason that RIL had contributed to the delay in moving the claim forward in India, and therefore should not be entitled to claim the pre-judgment interest for the full period of the loss.

111 Clearly the parties were disputing the inferences that could be drawn from the various letters exchanged between the parties and with RIL. I was not minded to scrutinise with any more detail the primary evidence than is necessary if I had to decide the case myself on what the correct inferences of fact ought to be on the question whether RIL had contributed to the delay and if so, then to what extent RIL had contributed to the delay in order to ascertain the number of years of interest that should be deducted under the circumstances. It is sufficient for me to just broadly review the evidence placed before me by the parties and the IA's written determination and no more.

112 From my cursory examination of the documentary evidence presented to me by the parties, I did not think that the conclusion of the IA was against the weight of the evidence. I think this is one area where the IA had asked the right question on a pertinent issue: whether or not there should be some reduction of the interest period allowed should RIL be found to have contributed to the delay in the Indian proceedings. Even if the IA had answered the right question wrongly (which I do not believe he did), I am not minded to intervene because OIC had failed to show in what way the IA had made a "manifest error" or had not exercised sufficient "due care and diligence" in reaching this finding of his. It is not for me to re-visit the entire evidence, closely scrutinise them to ascertain if the IA had made any error in his fact finding. But I believe that I am entitled to look beyond the face of the written determination of the IA and examine some of the underlying evidence to better understand the issues and to determine whether or not there is indeed a manifest error (or a negligent error due to a lack of due care and diligence) committed by the IA as alleged by OIC.

113 I do note that evidence evaluation is an area eminently within the purview, discretion and judgment of the IA for which I will be loathe and very slow to disturb unless it is shown clearly to me to be a manifest error. It must be borne in mind that the evaluation of the weight of the evidence and the relative credibility of witnesses, very much the exclusive domain of the appointed fact finder, is plainly an area that the court faced with an application to set aside the determination of an expert determiner would eschew going into, unless the fact finding had been tainted by fraud, collusion, bias or lack of *bona fides* which is not the case here, or there had been a manifest error justifying judicial intervention.

114 After a careful consideration of the parties' submissions which included a summary review of some of the relevant underlying evidence, I see no reason on the basis of any principle of manifest error to interfere in any way with the **IA's decision to deduct a total of 3 years of pre-award interest** and **fix a later starting date for the accrual of interest *i.e* 14 November 2002**.

Obvious manifest error providing only 1.5 years of interest after discount

115 I will now analyse mathematically how the IA computed the total interest of US$664,416 and added that to the above principal sum of US$3,176,168, thus valuing or commuting the OIC's Scheme claim at a total sum of US$3,840,584.

116 The IA basically allowed the interest on the loss to run for only 1.5 years at 13.5% p.a. The actual interest at 13.5% p.a. on a principal sum of US$3,176,168 for 1.5 years is US$3,176,168 x 0.135 x 1.5 = US$643,174.02 computed on a simple interest basis. The IA however computed that interest amount for 1.5 years to be US$664,416.00. Why is there a difference of US$21,241.98? This is no mathematical error as the **IA computed the interest** of 1.5 years not on a simple interest basis but **on a compound basis with annual rest** as follows: US$3,176,168 x ($1.\mathbf{\mathit{135}}^{\mathbf{\mathit{1.5}}}$ – 1) = US$664,415.91.

117 That the IA had in fact used a compound interest basis can again be shown by the following compound formula for the total sum with compound interest at yearly rest over 1.5 years: US$3,176,168 x $1.\mathbf{\mathit{135}}^{\mathbf{\mathit{1.5}}}$ = US$3,840,583.91 which is exactly the final sum awarded by the IA for the principal sum compounded at ***13.5***% p.a. for ***1.5*** years. See the corresponding numbers in bold, italics and underlined in the compound formula.

118 The IA is also substantively saying that the **compound interest** that he had allowed **stops running 1.5 years after the start date on 14 November 2002**. The IA has thus effectively decided that the interest does not accrue after **14 May 2004**.

119 This is strikingly a manifest error. I can see no rhyme or reason why the Indian court or even the Singapore court for that matter would be saying that the interest should stop running on 14 May 2004. This end date for the interest accrual period is **even before** the date of the Scheme specified valuation date of 19 September 2006 and the Scheme cut-off date of 14 May 2007. How is it logical for the interest on the principal sum to stop accruing even before the valuation date or the Scheme cut-off date? I cannot find anywhere in the Scheme document which states that the interest is to stop running on all claims 3 years prior to the cut-off date and more than 2 years prior to the valuation date. If that were the case, I do not believe that OIC and the other Scheme creditors are likely to vote in support of the solvent Scheme which would deprive them of interest in such a manner.

120 Without the need to do any further verification, it is obvious that some mathematical error has

been made by the IA when he allowed only 1.5 years of interest. OIC as the Scheme creditor will be severely prejudiced especially when the interest on the loss is deemed to commence on 14 November 2002. Six years later, OIC still has not received any payment as a Scheme creditor.

121 In my view, the proper mathematical calculation to compute the interest component is to allow the interest at 13.5% p.a. to first accrue up to the likely date of disposal of RIL's suit in India which is estimated to be sometime perhaps in late 2011 or early 2012. The total period of the interest should be from 14 November 2002 to late 2011/early 2012, which is a total of some 9 years for accrual of the interest. Then that accrued interest amount for 9 years is added to the principal sum, and that total sum must be discounted back to the correct Scheme valuation date in order to quantify the claim in India as at the specified valuation date under the Scheme. To provide guidance on the manner of computation, I have provided at the Annexes two examples of how that process may be done. **Annex A** is a computation to value the Scheme claim at the cut-off date of 14 May 2007. **Annex B** is a computation valuing the Scheme claim at the correct valuation date of 19 September 2006.

122 As I shall explain later in this judgment and in even more detail in the Annexes, it is correct for the IA to have applied a discount because of the earlier receipt of payment on the contingent liability claim by OIC from RNA as compared to the payment out on future date by OIC to RIL after the judgment in India sometime in 2011/2012. But the way the IA applied the discount was mathematically flawed and I must add completely unsound in logic. The IA's application of the discount was a mathematical miscalculation, and in light of *Geowin* (*supra* [47]) at [19], a mathematical miscalculation qualifies as a manifest error that justly requires judicial intervention.

Use of compound interest with annual rest by IA in his interest computation

123 Is it wrong for the IA to apply compound interest instead of simple interest for the interest computation? This is an interesting question which the parties had not addressed. Either the parties were unaware that the IA had used a compound interest formula and accordingly no objections were taken in particular by RNA or RNA had knowingly decided to accept the compound interest methodology used by the IA. I do not believe that OIC will object to the use of a compound interest formula as it gives a result that benefits OIC and disadvantages RNA (whereas the simple interest formula, if used by the IA, would disadvantage OIC and benefit RNA).

124 In Singapore, the power of the High Court to award or direct interest to be paid can be found in paragraph 6 of the "First Schedule: Additional Powers of the High Court" in the Supreme Court of Judicature Act (Cap 322) ("*First Schedule*"):

> **Interest**
>
> 6. Power to direct interest to be paid on damages, or debts (whether the debts are paid before or after commencement of proceedings) or judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court.

Paragraph 6 above does not say that the interest is "simple interest". Accordingly, it should not be read restrictively as limiting the power of the High Court to award only simple interest and not compound interest.

125 However s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed), which specifically enables the courts to award pre-judgment interest on debts and damages, appears to limit the courts' power to award

only simple interest (on such debts and damages for the pre-judgment period) which is then merged into the total judgment sum awarded. Section 12 provides as follows:

> **Power of courts of record to award interest on debts and damages**
>
> **12.** —(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be **included** in the sum for which judgment is given **interest** at such rate as it thinks fit **on** the whole or any part of the **debt or damages** for the whole or any part of the period **between the date when the cause of action arose and the date of the judgment**.
>
> (2) Nothing in this section —
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange. [emphasis added]

126 Is there a provision in India similar to s 12 above which only authorises pre-judgment interest on debts and damages to be awarded on a simple basis? No evidence was led on this. Under the circumstances, I shall assume that the law in India is similar to that in Singapore on this issue given the historical links that India and Singapore have to Britain and the fact that both are Commonwealth countries with common law systems whose origins can be traced to Britain. I further assume that just as in Singapore, courts in India do refer to English decisions for guidance in many areas including those of tort and contract.

127 I shall now examine the ambit of s 12 of the Civil Law Act. This enabling provision is simply silent on the granting of any authorisation to grant compound interest. Is it then to be inferred then that the High Court therefore has no more power whatsoever to grant pre-judgment compound interest on any debt or damages under paragraph 6 to the *First Schedule*? Has s 12 also taken away or emasculated the power of the High Court to direct compound interest to be paid on (a) debts or damages from date of judgment till date of satisfaction of the judgment sums awarded (*i.e.* post-judgment interest); (b) sums found due on taking accounts between parties; and (c) sums found due and unpaid by receivers or other persons liable to account to the court? I do not think so.

128 Although s 12(2)(a) of the Civil Law Act makes clear that the section itself does not authorise the giving of compound interest for debts and damages covering the pre-judgment period, it does not expressly prohibit the court from granting compound interest *per se* or from granting damages assessed with reference to the actual compound interest lost or forgone by the plaintiff who has suffered those damages. I do not think that s 12 of the Civil Law Act is meant to be exhaustive concerning the power of the courts to award interest on debts and damages in any specified manner *i.e.* only on a simple basis and on no other. The section is silent with respect to the principles that the court may apply when assessing the amount of damages for which it gives judgment. The section does not preclude a court from taking interest losses into account when awarding damages for tort or breach of contract.

129 Accordingly, it is important to distinguish between "interest **as** damages" and "interest **upon** the damages". Section 12 of the Civil Law Act will apply to the interest to be awarded **upon** or **on** the

damages for a late payment but will not, in my judgment, apply to an award of interest **as** damages, which comprise the loss to the plaintiff assessed with reference for instance to the compound interest that the money could possibly earn through investment in safe instruments or which could have been used to reduce the debts of the plaintiff and defray the compound interest that he has to pay for those debts. If the loss or damage suffered by the plaintiff can be accurately computed using compound interest, then the plaintiff should be entitled to claim the compound interest as his loss or damage. This is a separate head of claim or damage which is represented by the compound interest. It is therefore not within the scope of s 12 of the Civil Law Act.

130 I do not believe that awards in appropriate cases of compound interest **as** damages for non-payment of a debt or for delayed payment of tortuous claims, including awards of compound interest as restitutionary relief in respect of a defendant's unjust enrichment, conflict at all with s 12 of the Civil Law Act, which is concerned strictly with interest **on** a debt or damages over the **pre-judgment period**.

131 Given the circumstances and the present state of the law concerning compound interest, I will not interfere with the exercise of discretion by the IA, using his actuarial expertise and experience, to select the use of a compound interest over the simple interest methodology. In my view, there is no manifest error in the IA's choice of a compound interest methodology for his valuation of the Scheme claim. There are good and sound financial principles behind the adoption of the compound interest method for the interest computation by the IA and it reflects the reality of modern commerce.

132 Essentially, RIL's claim in India represents an involuntary "loan" by RIL (the plaintiff) to OIC (the defendant) and that "loan" effectively constitutes an unsecured debt owed to the plaintiff by the defendant. Where the period of the involuntary "loan" is long, the interest rate is high and the principal sum involved is large, as in this case, it is appropriate to use a compound interest methodology which puts RIL as far as is possible, in the same position as it would have been, had it not been injured. The compound interest is to compensate the plaintiff for the full extent of his loss or damage whereas the use of simple interest would not adequately do so. Like all borrowings in the money market, interest charges calculated would inevitably be calculated on a compound basis and not on a simple basis. OIC may well have used the payment from the commuted contingent liability to reduce its own commercial borrowings, for which interest will have to be paid on those loans. More importantly, the compound interest as damage will have to be accumulated and used by OIC to defray payment on the potential claim in India from RIL, for which compound interest may well have to be paid.

133 Further, there is a recent decision of the House of Lords in the case of *Sempra Metals Limited v Her Majesty's Commissioners of Inland Revenue and Customs* [2007] UKHL 34 ("*Sempra Metals*") where an important question of principle was addressed: whether the claimant who seeks a remedy on the ground of unjust enrichment is entitled to an award for restitution of the value of money that is measured by compound interest? It was held that compound interest is available in common law as a restitutionary remedy where such an award was necessary to achieve full justice for the claimant. Lord Nicholls of Birkenhead started his speech with an overview which is most apt to describe the very unsatisfactory state of the common law on compound interest:

> My Lords,
>
> 51. Legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again. The unsound rule returning once more for consideration by your Lordships' House concerns the negative attitude of English law to awards of compound interest on claims for debts paid late.

52. We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognise and give effect to this reality.

53. Unhappily this is still not altogether so. To a significant extent the law remains out-of-step with everyday life in the 21st century. In the first half of the 19th century the common law adopted a restrictive rule: unpaid debts do not carry interest, either compound or simple. This was an exception to the ordinary common law principles applicable to recovery of damages for breach of contract.

54. Since then successive statutes have made general provision for courts to award interest in many instances. This provision is limited to simple interest. The statutes make no provision for compound interest.

55. In 1984 your Lordships' House curtailed the scope of the restrictive common law rule. Despite this, by common accord the current position is not yet coherent or satisfactory. So your Lordships are being called upon to consider the implications of this restrictive rule once more. Your Lordships have to consider how far the common law should still abide in a world where present-day economic reality is not allowed to intrude.

134 Lord Nicholls ended with the following conclusion (after an extensive review of the authorities and a careful examination of various principles) with which I will most respectfully and readily adopt in full as the correct position also of the law in Singapore:

100. For these reasons, I consider that the court has a common law jurisdiction to award interest, simple and compound, **as** damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort. [emphasis added]

135 I do not believe that s 12 of the Civil Law Act prevents the development of the common law by the courts in granting compound interest **as** damages in appropriate cases. Section 12 of the Civil Law Act may not authorise the granting of compound interest but it does not prohibit the courts from granting compound interest **as** part of damages on claims for non-payment of debts, breaches of contract and in tort either. Section 12 does not displace any jurisdiction the courts themselves have to award compound interest losses **as** damages if the need arises. Accordingly, I am of the view that the courts in Singapore have the power to grant compound interest **as** damages if these damages are proved and the justice of the case requires that such damages should to be paid. This position taken of the law in Singapore will also help to further promote, strengthen and entrench Singapore as an important financial and business hub for this part of the world. Not to align the law in Singapore with commercial reality and with the needs and expectations of the business community at large in respect of granting compound interest **as** damages as set out in *Sempra Metals* will be a serious mistake.

136 I do not know the present state of the law on compound interest in India on debts and damages and whether the courts in India are going to adopt the above common law position as enunciated in *Sempra Metals* when the Surat court pronounces its judgment possibly sometime in 2011/2012. But what is clear is that the seminal decision of the House of Lord in *Sempra Metals* will certainly influence the development of the common law in Commonwealth countries and it certainly buttresses the decision of the IA, who had in my view rightly adopted the compound basis for his interest calculations and for discounting. I believe that the House of Lords decision of *Sempra Metals* now

focuses attention on the need to consider awarding compound interest **as** damages in appropriate cases and with such guidance from a pronouncement on this issue from the highest court in England, it throws open the door in common law jurisdictions to the possible award of compound interest in the nature of damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort.

137 For the reasons I have stated, I would follow this decision of the House of Lords in *Sempra Metals* and it also accords with commercial and economic reality because a claimant in long-running case such as this will be severely under-compensated in damages were the court to have power only to award simple interest and no discretion to award any compound interest even in a deserving case. The correct legal position in Singapore is that the courts are not so hampered and have an unfettered discretion to award simple or compound interest **as** damages as is appropriate that would justly compensate the person for the loss that he has suffered.

138 Having set out the legal position in Singapore, it is for the IA as the independent expert on insurance matters to use his expertise and experience and take all relevant matters into account to decide whether to use an actuarial methodology or a compound interest formulation in his re-determination. If the IA again uses the compound interest formulation in his re-determination as he had done previously in his first determination, the IA cannot be faulted for doing so since it is clear to me that for large debts unpaid and for very substantial damages sustained over long periods when the interest rate is ascertained to be high, as is the case here, the compound interest methodology is a far more accurate and equitable one to use for ascertaining the real damage suffered by the claimant than the simple interest formulation. The compound interest formulation will properly compensate the claimant for the true cost or damage to him caused by the long pre-judgment delays in getting the judgment and the long post-judgment delays in finally getting payment. Such actual interest losses on a compound basis as damages should be recoverable subject to (a) the usual sufficiency of evidence to establish proof of loss; (b) remoteness of damage; (c) obligations to mitigate damage; and (c) any other relevant rules relating to the recovery of alleged losses. If the compound interest amount fails to qualify for award as a separate item or head of damage *e.g*. where the damage cannot be proved for being too remote or for other reasons, then s 12 of the Civil Law Act will nevertheless still give power to the court to grant interest on a simple basis where that section is applicable.

139 In my opinion, it will not be without basis to conclude that where large sums of money are involved, delays in payment are considerable and interest rates are high, then the loss from the compound time-value of money (a) is reasonably foreseeable; (b) is within the contemplation of reasonable commercial men; and (c) must be sufficiently recognised by the law, when evaluating or assessing compensation for the claimant's actual interest losses caused by the late payment of (i) a debt owed to a claimant; or (ii) the monetary amount of the loss or damage suffered by him. For this, I need go no further than to quote the following passages in *Sempra Metals*:

> **Lord Hope of Craighead:**
>
> 16. ... But I agree ….that the House should take the opportunity of departing from Lord Brandon of Oakbrook's analysis in *President of India v La Pintada Compania Navigation SA* [1985] 1 AC 104 and that it should hold that at common law, subject to the ordinary rules of remoteness which apply to all claims of damages, the loss suffered as a result of the late payment of money is recoverable. This is already the law where the claim is for a debt incurred by a building contractor to raise the necessary capital which has interest charges as one of its constituents: see *F G Minter v Welsh Health Technical Services Organisation* (1980) 13 Build LR 1, CA, 23, per Ackner LJ; *Rees and Kirby Ltd v Swansea City Council* (1985) 30 Build LR 1, CA; see also *Margrie Holdings Ltd v City of Edinburgh District Council*, 1994 SC 1, 10-11. The reality is that every

creditor who is deprived of funds to which he is entitled and which he needs to run his business will have to incur an interest-bearing loan or employ other funds which could themselves have earned interest. It is a short step to say that interest losses will arise "in the ordinary course of things" in such circumstances.

17. I also agree with Lord Nicholls that the loss on the late payment of a debt may include an element of compound interest. But the claimant must claim and prove his actual interest losses if he wishes to recover compound interest, as is the case where the claim is for a sum which includes interest charges. The claimant would have to show, if his claim is for ancillary interest, that his actual losses were more than he would recover by way of interest under the statute. In practice, especially where the period over which interest is sought is short or where the claimant does not have to borrow money to replace the debt, simple interest under section 35A of the Supreme Court Act 1981 is likely to be the more convenient remedy.

18. ….The conclusion that the court has jurisdiction to award compound interest as damages at common law is, however, a valuable one. It provides us with a building block which was missing when the House rejected the use of compound interest as a possible solution in equity in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

…

33 ……Simple interest is an artificial construct which has no relation to the way money is obtained or turned to account in the real world. It is an imperfect way of measuring the time value of what was received prematurely.

…

36…. As Lord Nicholls points out (see para 99), there is now ample authority to the effect that interest losses which are recoverable as damages should be calculated on a compound basis where the evidence shows that this is appropriate. The same rule should be applied to the restitutionary remedy at common law.

…

Compound interest in domestic law

41. The fundamental point, however, is this. Compound interest is a necessary, and very familiar, fact of commercial life. As the Law Commission said in its Consultation Paper on "Compound Interest" (2002, No 167), para 4.1, the obvious reason for awarding compound interest is that it reflects economic reality. In its "Discussion Paper on Interest on Debt and Damages" (No 127, 2005), para 8.18 the Scottish Law Commission said that it endorsed the view of the Law Society of England and Wales in their response to the Law Commission's Consultation Paper that "simple interest never provides a full indemnity for the loss to the litigant." In para 8.38 the Scottish Law Commission said, having examined the arguments either way, that it was inclined to the view that the case against the compounding of interest was essentially a case against interest itself. Computation of the time value of the enrichment on the basis of simple interest will inevitably fall short of its true value. Such a result would conflict with the principle that applies in unjust enrichment cases, that the enrichee must give up to the claimant the enrichment with, as Professor Birks put it in *Unjust Enrichment* (2nd ed), p 167, no hint of a restriction to giving back. In my opinion the compounding of interest is the basis on which the restitutionary award in this case should be calculated.

…

Lord Nicholls of Birkenhead:

112. If the House takes this opportunity I venture to repeat there can only be one answer on this important question of law. Nobody has suggested a good reason why, in a case like the present, an award of compound interest should be denied to a claimant. An award of compound interest is necessary to achieve full restitution and, hence, a just result. I would hold that, in the exercise of its common law restitutionary jurisdiction, the court has power to make such an award.

113. The law will achieve a principled measure of consistency between contractual obligations and restitutionary obligations. The common law in Australia has developed in this way. The common law in England should do likewise.

…

Lord Scott of Foscote

151. I concur with your Lordships in concluding that interest, whether simple or compound, can represent an item of contractual damages or tortious damages, subject to the normal rules applicable to such claims. I take the view that a claim to interest as part of a restitutionary remedy for money paid by mistake can and, subject to change of position defences should be, accepted if the interest has actually been earned, but not otherwise.

140 It may be pertinent to note also that an arbitral tribunal has the power to award compound interest. See s 12(5)(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) which states:

> (5) Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings —
>
> > (b) may award interest (including interest on a compound basis) on the whole or any part of any sum which —
> >
> > > (i) is awarded to any party, for the whole or any part of the period up to the date of the award; or
> >
> > > (ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.

There is also a similar provision in s 35(1) of the Arbitration Act (Cap 10, 2002 Rev Ed) which provides that:

> 35. —(1) The arbitral tribunal may award interest, including interest on a compound basis, on the whole or any part of any sum that —
>
> > (a) is awarded to any party; or
> >
> > (b) is in issue in the arbitral proceedings but is paid before the date of the award,
>
> for the whole or any part of the period up to the date of the award or payment, whichever is

applicable.

(2) A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

141 If the correct state of the law on compound interest is what I have stated, then that eradicates a significant disparity or anomaly between the powers of courts and of arbitrators in their respective powers to award compound interest in an appropriate case.

142 Finally, in the light of the express powers given to an arbitrator to award interest on a compound basis, it will be rather unusual and in fact anomalous if I were to hold that the IA has no jurisdiction and would have exceeded his mandate to award compound interest when the Scheme itself does not preclude him from awarding it based on the particular nature of this Scheme claim.

Paragraph 2.2 of the Scheme does not preclude pre-judgment interest claim

143 Before the IA, OIC claimed the accrued interest at 21% p.a. from the date of the vessel collided with the SPM *i.e.* 12 October 1998 to the date of final payment. Based on RNA's 38.35% share of the insured's or RIL's claim before the Surat court of US$9,300,578.24, the interest claim on that principal amount was US$1,953,121.43 p.a. from the date of collision until the date of final settlement.

144 RNA's contention before the IA was that interest should not be awarded at all as the policy did not provide for payment of interest and no interest whatsoever was payable under the Scheme for Scheme claims.

145 The IA had noted the existence of the following provision which governs the payment of interest under the Scheme:

2.2 **Interest**

The Company shall make no payment under the Scheme for interest of a Scheme Claim, except that where a Scheme Creditor is entitled to interest under any statute, contract or court order, he shall to that extent be entitled to claim interest, for the period up to one day before payment. [emphasis added]

146 Both parties before me were agreed that paragraph 2.2 of the Scheme stipulates that RNA shall make no payment under the Scheme for interest in respect of a Scheme claim, unless the exception (see words in bold above) in paragraph 2.2 applies. The question then is whether the exception applied. Here the Scheme claims include contingent claims which can arise out of a contractual claim or an insurance claim dispute before a court. If the underlying contract or court order giving rise to a Scheme claim entitles the claimant to claim interest, then the exception must apply. Once the exception applies, the Scheme creditor shall, to the extent that the contract or the court order provides for the interest, be entitled to make a Scheme claim for interest up to one day before payment under the Scheme.

147 It is envisaged that the Surat court order is going to entitle RIL to claim pre-judgment interest on the loss of the SPM from the date of writ to the date of judgment and thereafter, post-judgment interest on the judgment debt to the date of payment. As such, the Scheme claim from OIC will fall within the exception provided in paragraph 2.2 of the Scheme. The Scheme creditor will be entitled to claim interest for the period up to one day before RNA's actual payment of the Scheme claim. Hence, OIC shall be entitled to claim the pre-judgment interest accruing from 14 November 2002 (*i.e. 3 years*

after the date of the writ in India in October 1999 because the IA deducted 3 years for the interest period to penalise RIL for its lack of cooperation which contributed to the delay to the court proceedings in India) to the likely date of judgment in India in the year 2011 or 2012 and thereafter, to further claim post-judgment interest on that judgment debt from the date of judgment to one day before the date of actual satisfaction of the judgment debt.

148 It is just as pertinent to observe that the IA (at p 20 of his determination) had also considered, *inter alia*, the fact "*that it is the common practice for pre-judgement interest to be considered and made payable by the courts in Singapore as well as in India.*" This fact is important for two reasons in my view. First, it shows that the IA was all the time assessing and valuing the contingent claim that is currently before the Surat court and second, that the Surat court is likely to award interest on the principal amount of the loss from the date of the loss or the date of the writ (27 October 1999) to the date of the court judgment (*i.e.* pre-judgment interest).

149 After specifically considering paragraph 2.2 of the Scheme and the practice of the courts to award pre-judgment interest, the IA decided "***on balance in the circumstances of this case, to consider the payment of interest***" and he accordingly awarded interest. See pg 20 of the IA's determination. This shows that the IA did not regard, and rightly so, that paragraph 2.2 of the Scheme precluded all interest claims on the facts of this case. The IA's finding that interest is in fact payable under the Scheme accords with my interpretation of paragraph 2.2 that the exception applies in this case and the interest claim on a Scheme claim submitted by OIC is allowed under the exception provided in paragraph 2.2.

150 If paragraph 2.2 of the Scheme is interpreted to mean that no interest is payable whatsoever on the principal amount of the claim of US$3,176,168, then it will impugn the IA's award of interest of US$664,416. Clearly, that interpretation was not adopted by the IA and the IA would be in error if he had adopted that interpretation of paragraph 2.2.

151 The IA thus decided that RIL was entitled to interest and rightly rejected RNA's contention that no interest was payable under the policy and the Scheme. The IA must have concluded that paragraph 2.2 of the Scheme had not excluded a claim arising out of a court judgment or court order granting pre-judgment interest as part of the final judgment sum. If it were otherwise, the IA would not even have considered and applied an interest rate of 13.5% p.a. for the interest computation (pegged to the average rate of prejudgment interest normally applied by an Indian court) nor would the IA have allowed any interest on the principal sum of US$664,416 to be added to the principal sum of US$3,176,168 to give the final claim amount which the IA assessed at US$3,840,584.

152 RNA had not argued before me that the IA was manifestly wrong to have determined the interest based on the known practice of the courts in India. Once the IA had interpreted the purport of paragraph2.2, adopted the common practice of the courts to grant pre-judgment interest and decided to award interest in his expert determination, there is no room to argue now that it was manifestly wrong of the IA similarly to include the likely total quantum of the pre-judgment interest as a matter of principle to value and commutate the contingent Scheme claim based on a judgment likely to be entered against OIC in India.

Interest period and total claim amount (principal plus interest) discounted to the relevant valuation date

153 The only issue left is the likely period that the Indian court in Surat will allow for the accrual of pre-judgment interest. Obviously, the period will continue to run up to the likely date of the final disposal of the case in India, which may be perhaps sometime in late 2011 or 2012 when the final

outcome will be known in India after the appellate processes are over and the lower court judgment has either been affirmed, modified or overturned by the appellate court. See **Annex 9** of the IA's determination which enclosed the letter dated 16 April 2008 from the lawyers in India, M/s Vishnu Mehra & Company, advising on the likely length of time to complete all the court proceedings including the appeals in India. I note that the IA had rightly considered this letter from the lawyers in India (attached as **Annex 9** to his determination) to ascertain the probable date for the final disposal of the case in India because this estimated date is an important fact needed in the mathematical computation of the period of accrual of pre-judgment interest and in ascertaining the appropriate number of years of discount to use. For the purpose of my own discounting calculations in **Annexes A and B**, I have assumed the probable judgment date of the Surat court to be on 14 November 2011 for ease of illustration and explanation of my computation based exactly on a period of **9 years** from the date that the IA had decided the pre-judgment interest is to commence (*i.e.* 14 November 2002).

154 The Surat court, if it is minded to grant pre-judgment interest, will in all likelihood grant pre-judgment interest up to the date of judgment and not stop its accrual on the Scheme cut-off date or the Scheme valuation date, both of which dates are of no concern whatsoever to the Surat court. Hence, the Surat court judgment amount will have full pre-judgment interest (accruing from the date of loss to the date of its judgment) added to the principal judgment sum to form the total judgment sum. This pre-judgment interest period is at least 9 years on the same premise that the Surat court is likely to penalise RIL for its contributory delay (which the IA had done to OIC) and allow the interest on RIL's loss to commence only on 14 November 2002, which is more than 3 years after the date of the writ on 27 October 1999 and more than 4 years after the date of the actual loss/accident on 12 October 1998.

155 The amount representing 38.35% of that total judgment sum (principal amount of loss plus full pre-judgment interest) to be awarded in late 2011 or 2012 and constituting the contingent future liability of RNA to OIC under the reinsurance contract must therefore be discounted from the likely date of the judgment in India to the valuation date specified under the Scheme for OIC's contingent Scheme claim pursuant to its reinsurance contract with RNA.

156 Assuming the IA is right that the valuation date for the Scheme claim is indeed the claims' cut-off date of 14 May 2007 (which I do not believe he is), it appears from the determination that the IA had allowed a discount of 3 years. But this 3 years discount must be deducted from or discounted from the date that the likely judgment in India will be delivered (*i.e.* 2011/2012 or say 14 November 2011) and not from the cut-off date which the IA did, thereby giving an erroneously and illogically low 1.5 years as the total interest allowed. This amounted to a manifest error in his determination. **Hence, the interest allowed should be 9 years minus 3 years giving 6 years of interest entitlement, and not 4.5 years minus 3 years giving only 1.5 years of interest entitlement.** The figure of 9 years is actually the period from 14 November 2002 (where the IA allowed the interest to commence running) till the likely date of judgment in India assumed to be around 14 November 2011. See the Annexes for a better understanding of the timelines.

157 It is my belief that it is next to impossible to explain a mathematical calculation using words alone, without actually doing the mathematical calculation itself (as shown in the Annexes) to demonstrate the mathematical logic of the calculation and to illustrate how it should be done. Using mere words to explain a mathematical analysis and a calculation is going to lead to misinterpretation and misunderstanding. It is prone to error and much too imprecise. If the IA in his re-determination was to estimate a different date for the likely date of judgment in India based on the letter from the said law firm in India, then the sums can be readily re-done following the sample calculations attached in the Annexes, if the IA so wishes, to arrive at the discounted valuation as at the correct valuation date on 19 September 2006.

158 The need to apply a discount is justified because OIC is being paid 38.35% of the lump sum of the likely total judgment sum in India much earlier. OIC need not wait till 2011 or 2012 to be paid. For the purpose of the discounting computation to obtain the valuation at the correct valuation date of 19 September 2006 which is shown at **Annex B**, it is assumed that RNA is paying OIC some 5 years and 2 months earlier and in advance what is the **present value of that 38.35% of the said judgment sum as at 19 September 2006**. A discount will have to be factored into the process of commutation by the IA, when he assesses the present value of a future lump sum being paid on the valuation date of 19 September 2006 itself, to discharge a contingent liability potentially occurring in the future. *Kendall* (*supra* [36]) explains at [20.6.2] the reasons for discounting as follows:

> In consideration of the fact that the reinsured is being paid a lump sum to commute the contract at an early date, rather than waiting to receive claims payments as and when underlying losses are paid, the parties will probably agree that the sum paid by the reinsurer to commute his liabilities under contract will be discounted by an amount reflecting an estimate in the decline of the value of money because of inflation, current and projected interest rates, and other similar factors.

159 In the Annexes, **my computations have applied the discount rate both to the principal sum plus interest**, and discounted the total of the principal sum plus the pre-judgment interest back to the correct valuation date, 19 September 2006. In other words, to account for the time value of money, the discounting has to be performed because OIC is receiving payment 5 years 2 months earlier on the valuation date as opposed to waiting until say 14 November 2011 for payment on 38.35% of the judgment sum from RNA. See the timelines in the Annexes.

160 I noted that RNA in its submissions had tried to suggest that the IA in his calculations had only discounted the interest but not the principal sum, and hence, any alleged under-compensation would have been more than off-set by the non-discount of the principal sum back to the cut-off date. This submission must have been made by RNA's counsel without any thorough understanding of how the IA performed his discount calculations, which had in fact discounted **both** the principal sum plus interest to the cut-off date, except that the IA's mathematical error was to minus 3 years from (or in other words, to apply a discount of 3 years to) the 4.5 year period instead of the 9 year period which he should have done for his valuation as of the cut-off date in order to give an interest period of 6 years instead of the erroneous 1.5 years of interest that he did.

161 RNA contended that the IA's determination on the discount remains binding even if one cannot understand the IA's reasoning or methodology in arriving at the discount. In this regard, RNA relied on *Alliance v Regent Holdings Incorporated* [1999] EWCA Civ 1953 ("*Alliance*"). In that case, the expert, Mr Margo, arrived at a valuation of a property (called Mermaid House) and articulated the various comparables (such as another property called Ionic Villa) and variables that he had taken into account. One of the parties attempted to set aside the determination on the basis that he could not reach the same conclusion as the expert despite following the articulated variables and methodology.

162 The relevant excerpts from the case reads as follows:

> It is Mr Vos QC's submission that paragraph 16.06 sets out a formula for calculating the adjusted sale price for Ionic Villa. In order to understand his submission it is necessary to refer in a little detail to the mathematics. In paragraph 16.05 Mr Margo records that Ionic Villa was sold for £7,000,000 in July 1991. It was sold on a 99 year lease. He records that in order to compare it with Mermaid House adjustments must be made to take into account differences between it and Mermaid House. In paragraph 16.06 Mr Margo sets out the adjustments which he applied to compare Ionic Villa with Mermaid House. It reads:

"The adjustments which I would apply to compare it with Mermaid House are as follows. Adjustment for date of sale add 70%, adjustment for less privacy add 20%, adjustment for smaller size add 40%, adjustment for lower specification add 10%, adjustment for longer lease deduct 15% and adjustment for more prestigious location deduct 20%."

At paragraph 16.09 Mr Margo sets out that having applied the adjustments, the value of Ionic Villa in April 1998 would be £10,920,000.

Mr Vos QC submits that in paragraph 16.06 Mr Margo describes the way the deductions are to be made. Applying that description, the resultant figure does not come to £10,920,000.

163 What distinguishes *Alliance* from the present one, however, can be found in a subsequent paragraph from *Alliance*, as set out below:

Mr Sher QC submits that there is no manifest error shown by paragraph 16.06. He submits that a valuer, when adjusting a comparable, may make his adjustments in a number of different ways. He may add or deduct a fixed sum. He may *add or deduct percentages of a fixed sum. He may make percentage additions sequentially or make individual percentage deductions or additions on a base figure*. He submits that examples of the different way in which adjustments can be made are to be found in the adjustments made by Mr Margo in respect of the other comparable, 56 Avenue Road. He further submits that a valuer may "mix and match" the methods by which adjustments are made. It is his submission that paragraph 16.06 is silent as to the method adopted by Mr Margo. In the circumstances, he submits that no mathematical error is shown. [emphasis added]

164 In that case, Gage J accepted that there were various ways one could make deductions from a fixed sum, *e.g.* making percentage additions sequentially or making percentage deductions to a base figure. However, in applying a discount to take into account the present value of money, there is only one correct way to do it, which is to apply the discount of 3 years to the global figure of 9 years from the date the interest on the amount of loss is allowed to start accruing (*i.e.* 4.5 years before the cut-off date being 14 November 2002) to the final date the amount would likely be paid (*i.e.* in the year 2011/2012 when the final decision before the Indian courts would be finally known). Any other way of applying the discount would be illogical and mathematically incorrect. The IA erroneously applied the 3 years discount to the 4.5 years period when it ought to have used the 9 years total period (*i.e.* 4.5 years prior to cut-off date plus the further 4.5 years to date of final judgment in India). I therefore distinguish the case of *Alliance* on the facts.

165 Accordingly, I am inexorably driven to find that a manifest error in computation had been made in the discount calculations by the IA in his determination. The matter is to be remitted to the IA specifically for him to address especially this particular point.

166 In a case like this where the principal sum is large, the rate used for the interest/discount/time value of money is very high at 13.5 % p.a. and the period over which the discounting is applied is long, then the actual computed figure of the commutation based on these large numbers have a very considerable impact on the final computed valuation figure and must therefore be accurately and correctly computed by the IA. Otherwise, it will result in gross injustice to the party who is made to suffer a large loss simply on account of a mathematical error in calculation.

167 I have therefore included two sets of detailed set of calculations with full explanation to provide guidance to the IA when he re-considers his earlier determination and does his re-calculations. **Annex A** gives the discount computation back to the cut-off date, which the IA incorrectly used as his

valuation date for the Scheme claim. On the other hand, **Annex B** gives the discount computation back to the Scheme specified valuation date of 19 September 2006. From the two Annexes, a comparison may also be made of the effect arising out of valuing as at different valuation dates and the impact it has on the final commutation sum.

Annex A calculations: Valuation at cut-off date of 14 May 2007

168 For discounting back to the cut-off date, **Annex A** shows that the number of years discount should be 3.311 years, which I agree can be rounded to 3 years of discount similar to what the IA had adopted at p 21 of his determination. However, the IA erred by deducting the 3 years of discount from the total period of 4.5 years ending at the cut-off date. The IA should have deducted the 3 years of discount from the total period of 9 years ending on the likely judgment date in India, giving 6 years of simple interest.

169 **Annex A** also gives an alternative computation showing that basically the same answer as the 6 years of simple interest at 13.5% p.a. can be made by compounding the interest for 4.5 years also at 13.5% p.a. from the start date of the interest accumulation on 14 November 2002 to the cut-off date, if one understands that all these calculations are basically to obtain the real present valuation of the claim as at the cut-off date, which is also the date of actual payment of the claim. I trust that the expert determiner who has a 1st Class Honours in Mathematics will have no difficulty understanding all my explanations in this judgment when the matter is remitted to him for re-determination to correct the error.

170 Six years of simple interest amount to a total of 6 yrs x 13.5% p.a. interest x the assessed commuted principal sum of US$3,176,168 = US$ 2,572,969. Adding the 6 years of simple interest to the principal sum of US$3,176,168 gives a total figure of **US$5,748,864.** In other words, the total principal estimated loss inclusive of the 6 years of simple interest works out to be **US$5,748.864** for the Scheme claim valued as at the cut-off date.

171 When compared with the US$3,840,584 allowed by the IA, OIC stands to lose a hefty sum of **US$1,908,280.** Even on the same erroneous valuation date of 14 May 2007, this is a very substantial difference by any measure if the manifest mathematical error committed by the IA is not corrected.

Annex B calculations: Valuation at Scheme specified valuation date of 19 September 2006

172 However, if the IA is minded to re-compute to the correct valuation date of 19 September 2006, then **Annex B** shows how the calculations should be made in my view.

173 My calculations show that a total of 4.371264 years of discount must be deducted from the total period of 9 years in order to value the Scheme claim as at 19 September 2006. This allows only an interest period of (9 years less 4.371254 years = 4.628736 years of simple interest). 4.628736 years of simple interest works out to be US$3,176,168 x 13.5% p.a. x 4.628736 = US$1,984,722. Adding the 4.628736 years of simple interest to the principal sum of US$3,176,168 gives a total figure of **US$5,160,890.** In other words, the total principal estimated loss inclusive of the 4.628736 years of simple interest works out to be **US$5,160,890** for the Scheme claim valued as at 19 September 2006, which I believe should be the correct valuation sum for the Scheme claim in the expert determination.

174 When compared with the US$3,840,584 allowed by the IA, OIC stands to lose a hefty sum of **US$1,320,306.** Again even with the correct valuation date of 19 September 2006, this remains a very substantial difference by any measure if the manifest mathematical error committed by the IA is

not corrected to the Scheme specified valuation date.

175 Although it may be more expedient for me to simply substitute or amend the final figure in the IA's determination, however I believe that the proper way and the legally correct decision is for me to remit the matter to the IA for him to re-determine the valuation of OIC's Scheme claim as at the Scheme specified valuation date based on the use of the appropriate and correct discount computation and to amend his expert determination so that it remains contractually binding on OIC and RNA under the Scheme.

Further interest to be awarded from valuation date till date of payment

176 There remains one last item to be computed. This is the further issue of the post-award interest payable on that valuation sum ("VS") determined by the IA and accruing until the date of actual payment to settle the Scheme claim.

177 If the IA adopts my computation at **Annex B**, then the VS as at the valuation date of 19 September 2006 should be the amount **US$5,160,890.** My computation in Annex B uses the following parameters which were ascertained by the IA himself and which I have accepted and not interfered with:

(a) The same principal sum for the loss ascertained at US$3,176,168 (based on the average of four repair estimates provided by IMODCO and Dolan) has been used in my computation;

(b) The same 13.5% p.a. figure has been adopted as the interest and discount rate for my computation;

(c) The same three years have been deducted from the interest period because of delays contributed by RIL, thereby setting the start date of the interest later as at 14 November 2002 instead of the earlier date of the writ on 26 October 1999;

(d) The IA's use of the same compound interest formula at yearly rest instead of the simple interest formula to compute the interest amount;

(e) I have assumed that the final judgment in India is likely to be sometime towards the end of 2011 (*i.e.* in November 2011 for the purpose of the computation in **Annex B**). But if the IA assesses the likely date for the final judgment to be at some other date, then he has to re-compute accordingly.

178 The calculations are for a valuation as at 19 September 2006, which also represents the notional date on which payment by RNA of the VS sum of **US$5,160,890** is expected to have been made in full and final settlement of the Scheme claim. Of course, there may be some small administrative delays in making actual payment which is understandable and which parties may reasonably ignore if the delay is trivial and the actual interest loss due to the administrative delays in payment is small.

179 But where in this case the VS sum is huge and the delay is very long, and especially where the delay in payment in this case is already more than 2 years since the expected date of payment on 19 September 2006, I believe that it is only right that further compound interest at an appropriate rate (based perhaps on the normal bank interest rates for an unsecured debt in Singapore) is payable on the delayed payment by RNA referenced to 19 September 2006. Since this is supposed to be a solvent Scheme which renders full compensation on all commutated Scheme claims, and since this involves strictly a commercial matter between commercial entities, no Scheme creditor should be

unduly made to suffer any large interest losses. On these issues, the observations raised in the Law Commission in England in its Consultation Paper on "Compound Interest" (2002, No 167) appear to me to be apposite.

180 I accept that it is the normal practice of the Singapore courts in granting **post-judgment interest** on a simple and not on a compound basis. However, this is not to say that the Singapore courts have no power to grant post-judgment interest on a compound basis in an appropriate case where justice requires it. An example would be where a very long period is expected to elapse from the date of judgment to the expected actual date of payment or where the post-judgment period has been prolonged (as in this case), or worse where the judgment debtor is going to delay making payment of the judgment debt in order to benefit from the low cost to him of the simple post-judgment interest in the court order on the judgment debt, while he benefits by investing that money elsewhere to obtain a higher or compound interest return. A judgment debtor ought not to be allowed to benefit from his procrastination in this way.

181 Order 42 r 12 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) in my view does not prohibit the granting of compound post-judgment interest *per se*. It merely states the rate of interest (now adjusted to 5.88% p.a.) to be used for post-judgment debts but it is silent on the manner of computing that interest whether on a simple or compound basis using that specified interest rate directed by the Chief Justice. Order 42 r 12 states:

> **Interest on judgment debts (O. 42, r. 12)**
>
> **12.** Except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of 6% per annum or at such other rate as the Chief Justice may from time to time direct or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied:
>
> Provided that this rule shall not apply when an order has been made under section 43 (1) or (2) of the Subordinate Courts Act (Chapter 321).

182 The IA must, in my view, therefore consider the following in his expert re-determination:

(a) Does paragraph 2.2 of the Scheme prohibit the payment of such post-award interest subsequent to the valuation date accruing up to the actual date of payment in satisfaction of the award, having regard to the fact that **the exception to paragraph 2.2 applies** since this Scheme claim from OIC is derived from a court judgment and the further fact that this is supposed to be a solvent scheme where Scheme creditors are to be paid in full?

(b) If paragraph 2.2 does not legally prohibit the payment of such interest on the "VS" post the valuation date, then should the IA exercise his discretion to award interest on the "VS" from 19 September 2006 to the actual date of payment having regard to all relevant circumstances including the fact that there has already been a very long delay in making payment by RNA to its Scheme creditors under the Scheme?

(c) Is any party culpably responsible for any delay in payment of the "VS"? If no party is responsible for any delay, then should any Scheme creditor to be penalised for the loss of interest occasioned by the long delay? How should the interest loss be computed?

(d) What is the appropriate interest rate to apply for such an interest payment on the unpaid "VS" that is post the valuation date to the actual date of payment? Is the Singapore's court

post-judgment interest rate of 5.88% p.a. from the date of judgment to the date of payment of the judgment debt to be followed as a guide or is some other interest rate to be applied? Is simple interest or compound interest at yearly rest to be used having regard to the very long period between the valuation date of 19 September 2006 and the expected date of actual payment of the VS? Are there sufficient reasons to adopt or deviate from the court's normal practice to award simple interest on post-judgment debts or should compound interest be awarded in this particular case due to the prolonged period between the valuation date and the date of actual payment having regard to normal commercial practice and the expectations of the parties for interest on unsecured loans? Should the IA, as the expert, rely on his actuarial experience to determine whether simple or compound interest on VS from valuation date to actual date of payment should be awarded?

(e) As was stated by the IA in his written determination that in exercising his judgment and discretion, he had to ensure that the claim settlement was fair and equitable to the parties concerned given the circumstances governing the case. If the interest post the valuation date till date of actual payment is not contractually prohibited by the Scheme, then it is worth noting that it is only fair and equitable on principle that interest should be awarded especially when such a long delay is involved and OIC has been kept out of pocket for so long whilst RNA is unfairly enjoying the fruits of the delay. Imposition of interest also ensures that payment on the ascertained Scheme claim as at the valuation date is made promptly by RNA without any unnecessary delay. Otherwise, RNA will take its sweet time to pay the Scheme claims much to the detriment of the Scheme creditors.

(f) Further, the IA pursuant to paragraph 5.1(b) of the Scheme has to re-set the "Independent Adjudicator's Ascertainment Date". RIL will then be obliged under paragraph 5.1(a) to pay in full to all Scheme creditors all their "Approved Scheme Claims" (*i.e.* all Scheme claims determined by the Scheme Manager and all disputed claims have been adjudicated by the IA) no later than 30 days after the "Independent Adjudicator's Ascertainment Date".

183 Until the IA completes this second aspect of the determination, the parties will still be at a loss as to the exact amount ("VS" plus interest, if any and in what form, from valuation date to actual payment date) that is payable to OIC as at the actual date of payment by RNA. The IA must complete his task and assist the parties in this regard as the interest involved on the very large "VS" will be significant in amount since the delay in payment has now stretched to over two years from the valuation date of 19 September 2006. As the IA had left this issue unresolved at the end of his earlier determination, the IA will now have the opportunity to fully resolve it for the parties.

184 The IA's job is only finished when the parties are clear on the exact amount to be paid for the commutated Scheme claim, including all the interest components up to the actual date of payment. If the date of actual payment is uncertain, the courts generally specify just the modality of calculating the amount of the post-judgment interest *e.g.* simple interest at 5.88% p.a. to be paid on the judgment sum awarded from date of judgment till the actual date of payment. The court's practice is therefore to specify the interest formulation clearly, and then leave the parties themselves to work out mathematically the actual amount of the interest payable that is post the judgment date until the date of actual payment. This formulation can be adopted by the IA if he so wishes.

185 To further assist the IA when he assesses the post-award interest, my interpretation of paragraph 2.2 of the Scheme after having heard the parties is that paragraph 2.2 does not preclude the granting of interest from the valuation date to the date of payment (*i.e.* interest on the "determination debt" arising out of the IA's determination which is analogous to interest on a "judgment debt" arising out of the court's judgment). The words in paragraph 2.2 -- "*The Company*

shall make no payment under the Scheme for interest in respect of a Scheme Claim" are applicable only when the exception does not apply. The exception is "*except that where a Scheme Creditor is entitled to interest under any statute, contract or* ***court order****, he shall to that extent be entitled to claim interest…"*. Where the exception applies as in this case *i.e.* where OIC is entitled to an indemnity by RNA for the interest likely to be awarded under a Surat court order against OIC, OIC is to that extent entitled to claim interest for the period up to one day before payment. This suggests to me that the Scheme in fact envisages post-award interest to be payable up to one day before actual payment for all cases falling within the exception, as this case does, so that Scheme creditors are not short-changed when the exception applies. Only when the exception is not applicable, *e.g.* in a case where the Scheme claim is derived from or has as its origins in a claim under a contract or a court order that excludes any entitlement to claim interest for the principal sum of the loss from the date of the loss to the date of judgment or the date of payment of the damages, then the Company (RNA) shall make no payment under the Scheme for interest for such a Scheme claim (which is not the case here).

186 This interpretation also makes commercial and business sense because this is supposed to be a solvent scheme for RNA to pay all ascertained claims in full. The spirit of true commutation (see [58]) and the purpose behind the solvent Scheme must also be observed. If the Scheme claim is one where the insured is entitled to claim interest on his loss till the date of payment or if the insured is entitled under a court order to claim interest from the date of his loss to the date of judgment and thereafter further interest on the judgment sum till the date of payment, then it does not appear sensible for the solvent Scheme to cap or limit the interest payment by RNA on the Scheme claim and stop it running on a fixed valuation date and ignore the interest that is still accruing on the Scheme creditor's commuted claim as from the valuation date till the date of final payment and settlement by RNA, whereupon rightfully, interest should then stop running as it is then up to the Scheme creditor to best invest the payment received from RNA to secure a return that will enable him to cover, as in this case, his potential liability before the Surat court after he has obtained the settlement payment from RNA.

Breach of natural justice

187 That leaves me with the final contention from OIC on a matter that is unrelated to the discount computation and interest. OIC argued that the IA breached the rules of natural justice by not ordering the disclosure of certain documents that were in RNA's possession. Those documents are, *inter alia*, (a) legal opinions of RNA's solicitors who have conduct of the proceedings in India as the lead insurer; and (b) opinions obtained from experts on the extent of OIC's liability in those proceedings to RIL. The IA's failure to order the disclosure of those documents, according to OIC, denied it an opportunity to properly present its case at the hearing before the IA. OIC contended that it was severely handicapped in its submissions without these documents.

No legal privilege

188 RNA argued that the documents were protected by legal professional privilege from disclosure to OIC. OIC submitted that this privilege argument was a non-starter for the following reasons:

(a) On first principle and simple logic, RNA cannot claim privilege against OIC. OIC was the named defendant in the Surat proceedings and their lawyers were appointed by RNA, who had conduct of the matter. The opinion of OIC's own lawyers (even though appointed by RNA) cannot be privileged as against OIC. This common sense position is clearly supported by the case law.

(b) In the case of *Commercial Union Assurance v Mander* [1996] 2 Lloyd's Rep 640, the English

Commercial Court considered a similar issue. The court considered contending arguments as to whether reinsurers could avoid giving discovery of documents to insurers on the basis that the interest was in conflict at that point in time.

189 Justice Moore-Bick considered the matter and stated as follows:

> The question whether reinsurers have a legal right to obtain disclosure of confidential documents relating to the handling of the original claim is closely linked to the extent of their practical interest but also raises wider questions. Mr Howars submitted that the issue has to be judged by reference to the time when Clyde & Co were instructed, rather than at any subsequent date, and that the fact that a dispute may subsequently have arisen between the parties so that their interests are now in conflict cannot affect the matter. On this point I think he is certainly correct. The passages in Phipson and Halsbury to which I have referred and the authorities on which they are based show that the right to obtain disclosure of documents in this context depends on their having been obtained by one party in furtherance of a joint interest, and in that sense on behalf of all those who share it. In a case where the documents contain legal advice that joint interest must exist at the time the advice is sought, and if it exists at that time it is not lost simply because the parties subsequently fall out: see, for example, *CIA Barca v Wimpey.* The fact that the interest of two parties are potentially in conflict does not in my view prevent their having a sufficient joint interest in the subject matter of the advice at the time it is sought to bring this principle into operation.

190 Further in Winterthur Swiss Insurance Company The National Insurance & Guarantee Corporation Limited v AG (Manchester) Limited (in liquidation) & others [2006] EWHC 839 (Comm), the English High Court considering a similar issue stated unequivocally as follows:

> The principle is that if party B has a sufficiently common interest in communications that are held by party A, then party B can obtain disclosure of those communications from party A even though, as against third parties, the communications would be privileged from production by virtue of legal professional privilege.

191 I accept OIC's submission that there is no legal privilege here preventing disclosure of the documents requested by OIC from RNA. The above judicial pronouncements of the English courts are highly persuasive in Singapore and are consistent with established legal principles. The principal consideration is to ascertain whether a common interest exists between the parties when the documents are prepared. If the documents are prepared pursuant to a joint interest, then the subsequent fall out between the parties cannot be a reason for the person in possession of the documents to deny the other access to the said documents. Legal privilege cannot be asserted against a party who at the inception of the preparation of the documents shares a joint interest.

192 In the present case, when the legal opinions were obtained by RNA on the proceedings in Surat and when experts had commented on RIL's claim before the Surat court, both RNA and OIC obviously shared a common interest. Thus, based on the above cases and established common law principles, I reject RNA's submission that these documents are privileged from disclosure.

No due process rule of natural justice for expert determination

193 RNA submitted that such an argument must fail in *limine* because of the unique features of expert determination. Rajah J in *Evergreat* (*supra* [27]) explained those features in the following passages (at [35] – [36]):

> 35 … An expert is permitted to inject into the process his personal expertise and to make his own inquiries without any obligation to seek the parties' views or consult them. An expert is also not obliged to make a decision on the basis of the evidence presented to him. He can act on his subjective opinion; that is the acid test.
>
> 36 There are two fundamental aspects or facets of natural justice that generally apply to dispute resolution. The first is that a decision maker should be disinterested in the outcome. The second is due process; both parties have the right to be heard on all the issues that are to be determined. *This second facet of natural justice does not apply to an expert's determination*. This is the single most significant distinction between expert determination and litigation/arbitration. [emphasis added]

194 Unless the parties have expressly or impliedly incorporated the "due process" rule of natural justice into their Scheme or contract under which the IA is to determine the dispute (which was not done in this case), it is wholly discordant to argue that a rule of natural justice exists to compel the IA to grant requests for disclosure of documents, when in the first place, the IA is not even obliged to make a decision on the basis of the evidence presented to him and he can adopt an inquisitorial or an investigative approach without referring the results to the parties before deciding on the matter. Remedies for such procedural irregularity available in arbitration are basically absent in an expert determination.

195 The following passage from *Kendall* (*supra* [36]) at [1.1.2] was quoted with approval in *Evergreat* (*supra* [27]):

> *The crucial difference between expert determination and arbitration lies in the procedure and the absence of remedies for procedural irregularity in expert determination*. An arbitration award may be set aside because the procedure fails to conform to the **statutory standard of fairness** which **is closely derived from the principles of natural justice**: **no such remedy is generally available to invalidate an expert's decision.** *An expert can adopt an inquisitorial, investigative approach, and need not refer the results to the parties before making the decision. An arbitrator needs the parties' permission to take the initiative, and must refer the results to the parties before making the award.* [emphasis added]

196 I further observe that the IA's power to request for further documents is addressed in paragraph 4(ii) of Schedule 2 of the Scheme. It reads:

> (ii) The Independent Adjudicator shall be entitled to request such further information or documents from the parties *as he may consider necessary.* [Emphasis added]

197 OIC made several requests for discovery of those documents via letter to the IA and highlighted the importance of those documents to its case. The IA declined to grant such an order. Unlike the context of arbitration where an award may be set aside if a party is unable to present its case (see *e.g.* Art 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration), there is no such equivalent in the context of an expert determination. There is therefore no merit to this objection.

198 I further note that the IA had regarded these documents to be irrelevant for the purposes of his determination. He was of the view that there was already ample relevant material placed before him on which he could properly proceed to make his determination. In my view, it is entirely within the IA's discretion to consider the amount and kind of documents he needs to make a determination. In this largely procedural area of the determination, it is not for the court to interfere willy-nilly with the IA's

exercise of his discretion. Given that the IA had found that he had ample relevant material already, I also cannot see how he has not exercised due care and diligence when the IA declined OIC's requests for discovery of documents which the IA did not find were relevant to his determination in any event. The IA may adopt any procedure or process that he sees fit and appropriate to do so in his assessment, be it an inquisitorial, adversarial or any other hybrid process. That decision of the IA must be regarded as final and non-reviewable. I further note that no procedural rules governing his determination had been set out in the Scheme. If so, then it is simply not persuasive to argue that he could have acted outside his remit here.

199 Moreover, the opinion rendered by the lawyers on whether RIL's claim in India will likely succeed is entirely irrelevant. The opinion of lawyers on the likelihood or probability of success of the law suit in India, in fact, should not be considered by the IA at all because the IA should be examining and evaluating only the primary facts and the evidence presented to him to determine whether RIL's claim in India will likely succeed on the liability issue. He has to apply his independent mind to the liability issue based on the relevant evidence presented to him and not on such irrelevant opinion of counsel. The IA should not be influenced in any way by these views/opinions of any of the lawyers given to their own clients of the likelihood of success or the strengths and weaknesses of their clients' cases. Such views/opinions of the lawyers add no value and in fact, may distort the whole independent process of evaluation of the factual evidence placed before the IA if the IA were indeed to factor such opinions of the lawyers into his evaluation of the liability issue. The IA's decision not to accede to RIL's application for the disclosure of the opinions of RNA's lawyers is in my view eminently correct.

200 Going into some specifics, the IA had basically decided on the premise that RIL would likely succeed in its claim in India against OIC. If it were otherwise, then IA would not have awarded even the sum of US$3,840,584 against RNA, which must necessarily be on the basis that RNA would be responsible to pay OIC for 38.35% of the successful claim by RIL against OIC in India under its reinsurance contract. As a practical consideration, now that the IA had decided in favour of OIC in terms of RNA's liability to it, there should no longer be any basis for OIC to complain that the IA's refusal to allow its application for discovery of documents in relation to the question of liability had prejudiced OIC. OIC suffered no disadvantage or prejudice from its failure to obtain the discovery of the lawyers' opinions on the likely outcome of RIL's suit in India since the IA had in fact evaluated the Scheme claim on the basis that RIL would succeed in its claim in India on the liability issue.

201 That leaves essentially the quantification of the loss. Again, the opinion of the lawyers for OIC on engineering and technical matters, including the question of CTL and the proper manner to quantify the magnitude of the loss before the Indian court, is entirely irrelevant. Furthermore, these lawyers will be in no position to render any opinion on matters not within their domain expertise at all. I do not see how the lawyers' own views on the viability, weakness and strength of the various expert evidence concerning engineering and technical matters and the highly technical quantification of the loss, can be of any assistance to the expert determiner. Expertise on the quantification of loss lay with technical experts like IMODCO and Dolan in relation to the repair costs, whether done in or outside of India. But such evidence was already made available to the IA. The IA was entitled to weigh such evidence and consider for himself how he would treat it to arrive at his own independent expert quantification of the repair costs having regard to the various probabilities and contingencies and all other relevant facts he considers necessary to take into account. The IA was entirely right to regard the documents sought for discovery by OIC to be entirely irrelevant. On the whole, I accept the following submissions from RNA that:

(a) OIC were already party and privy to the Indian court papers sought in the discovery;

(b) Solicitors' opinions on Indian proceedings, which were in any event matters of opinion and

therefore irrelevant;

(c) All the relevant survey reports had already been disclosed;

(d) RNA's reserve, was a commercial decision made by RNA and thus irrelevant to the issue of quantification; and

(e) It was agreed under the Scheme that the proofs of debt would be determined by an industry expert – the IA and not by some lawyers advising the parties.

202 Further, expert determination is a simple system of dispute resolution that the scheme creditors and RNA had voluntarily and contractually chosen to facilitate quick and efficient determination of all disputed Scheme claims. Strict timelines had also been set in the Scheme which were not to be extended unless there were exceptional circumstances. Schedule 2 of the Scheme states:

3. The use of an Independent Adjudicator is intended to avoid the delay and expense of court proceedings that may take place in Singapore, while ensuring that the issue will be dealt with impartially.

…

4(v) To ensure that proceedings before the Independent Adjudicator are conducted expeditiously and to save time and costs, the length of the hearing shall be limited to **one full 8-hour day**. At the hearing, parties will be given four hours each to make such representations as they may reasonably require.

4(vi) The Independent Adjudicator shall issue a non-speaking determination in writing in relation to the issues in dispute ("Written Determination") within **2 weeks** of the date of the hearing, in any event by or **no later than the Independent Adjudicator's Ascertainment Date**.

4(ix) Extension of the above time-frames may be granted by the Independent Adjudicator in his absolute discretion, but only in **exceptional circumstances**. [emphasis added]

203 Bearing in mind the tight timelines and if the IA was of the opinion that he had enough evidence to perform the quantification of the loss based on the experts' evidence, and no further evidence was needed, I am of the view that the IA, as the expert determiner, is entitled to make his determination on the available evidence before him without considering the further evidence sought by RIL that might be available and might possibly throw more light on the matter. It is for him to decide the boundaries of what and how much evidence he needs for his determination. It is up to the IA if he wants to be overwhelmed and swarmed by ensuring every piece of evidence, relevant or peripherally relevant, is available before deciding, or he can decide that he has enough evidence already to make a satisfactory and proper determination without delay and he proceeds to make that determination accordingly. Speed and finality is a key advantage of the expert determination process and indiscriminate discovery will detract from that. It is worthwhile to note [1.1.1] in *Kendall* (*supra* [36]):

…on a practical level, Expert Determination has apparently been attractive, largely because it is less expensive and speedier, avoids the rigours of the application of the rules of evidence and procedure and offers a finality which avoids delay, potential re-hearings and appeals, which is particularly suitable especially where an expert knowledge of the subject is required. …

204 Given the time constraints that the IA was working under, I do not think it was unreasonable of

him in any way to have decided that he had enough expert evidence to work on to reach his final determination on the quantum of the loss. I accept RNA's submission that the speed and efficiency, of importance in Schemes like the present one that involve commutation among many insurance creditors, will be lost if the system of expert determination were to be bogged down by the formalities and procedural niceties of more complex systems of dispute resolution like litigation or arbitration. The foundation for this submission rests on the following [1.6.10] -[1.6.11] in *Kendall* (*supra* [36]):

> Does the system require the observation of the "due process" rule of natural justice, the requirement that each party must be given a fair opportunity to be heard? This requirement does not apply to expert determination unless the parties expressly or impliedly agree that it should. This may at first sight seem somewhat shocking. However, consider the detailed implications of this rule as worked out in English law. The rule requires that all matters put to the tribunal by each party have to be disclosed to the other party and that the other party must also have the opportunity of rebuttal. The rule also requires the tribunal to make known the result of its own investigations to the parties and to give them the same opportunity of rebuttal. This is a much more demanding standard than simple fairness, which applies in some form to every binding system. The basic standard of fairness in expert determination is contractual, which does not mean that the requirements of due process must be followed. Some expert determination clauses incorporate due process rules into an expert determination. There seems little point in this: why not just have an arbitration?
>
> …Expert determination is a binding system, but does not operate by due process… The existence of a binding system without due process sometimes causes alarm, but the absence of due process is the essential difference in procedure between expert determination on the one hand and arbitration on the other. If people want a simpler system, something of the formality of the more complex systems has to be jettisoned.

205 Hence due process is not relevant to an expert determination. Even reasons need not be given by the expert for his determination, unless the parties have expressly provided for it, let alone the issue of what evidence is considered necessary for him to examine before he reaches his determination. Cooke J made this very clear at [95] in *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] 2 Lloyd's Rep 355, where he explained that:

> 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 of 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]

206 Accordingly, given that OIC itself had agreed to the IA procedure as the mode of dispute resolution over its Scheme claim, there is no basis for it now to complain that it lacks the procedural

safeguards found in arbitration or litigation.

Personal liability for negligence of an expert engaged in an expert determination

207 In a case where the contractual terms of engagement of the independent expert are silent on his liability in negligence to the parties engaging him to determine the dispute, there is the interesting question whether he will be personally liable to the party who can prove that it has suffered a loss as a result of the independent expert acting negligently and making an error in the course of his expert determination. The authorities below suggest that the independent expert can be sued for professional negligence if he is shown to have acted negligently. As V K Rajah J said at [20] in *Geowin* (*supra* [47]) that:

> 20 The defendant's complaints in the application are, in essence, no more than a back-door attempt to reopen the very prohibition stipulated by the SA to wit that the Award "is final and no appeal shall lie against such decision". As pointed out earlier (see at [7] above) even assuming *arguendo* that the Expert was mistaken or has made an error, **the proper remedy for the defendant is to bring an action against the Expert for negligence.** [emphasis added]

The following passage from *Kendall* (*supra* [36]) at [1.1.2] was quoted with approval by Rajah J in *Evergreat* (*supra* [27]):

> Experts are often loosely described as being some kind of arbitrator. The fact is that they are not. **Experts are a distinct species of dispute resolver whose activities are subject to little or no control by the court**, from whose decisions there is no appeal, **but who may nevertheless be liable for negligence in performing these otherwise unreviewable functions.** Arbitrators, by contrast, are subject to control by the court, some of their decisions are, at least in theory, subject to appeal, and they are immune from actions for negligence.

Mason P also made the same observations at p 596 – 597 in *Holt v Cox* (1997) 23 ACSR 590, a decision of the New South Wales Court of Appeal:

> As McHugh JA develops in more detail in his judgment in *Legal & General*, these and other recent authorities depart from earlier statements of the law in that they recognise it is insufficient for a dissatisfied party to point to some mistake in the reasoning process exposed by the expert valuer. At least as a matter of common law, a valuation will stand if it satisfies the description given in the contract between the parties. The readiness in the courts to provide greater latitude for experts to choose between different valuation methods and, within limits, to make errors in assessing facts or taking matters into consideration or declining to take matters into consideration, is influenced by **the recognition in *Arenson v Arenson* [1977] AC 405 and *Sutcliffe v Thackrah* [1974] AC 727 that the expert who negligently determines a valuation will be held liable in damages to the party suffering loss in consequence of the expert's negligence. [***emphasis added]*

208 This means that the expert will be exposing himself to very high personal financial risk and a huge potential liability if he does not insure himself adequately for professional negligence before taking up such assignments to act as an expert determiner. In a case such as this, an error will be very costly as large sums are involved. The manifest error in this case will result in a potential loss of some US$2m to OIC if uncorrected by the IA. Were I not to remit the determination back to the IA to address the manifest error on the discount computation and to correct the other glaring error of valuing the Scheme claim at the correct valuation date at the same time, then the IA could well be unnecessarily exposed personally to a potentially huge negligence claim if he is insufficiently insured

professionally. Now that I have remitted it back to the IA, this issue is academic.

Legal consequences of IA's negligence in the scheme

209 Whilst examining the Scheme in the course of this case, I have some difficulty deciphering whether the Scheme has expressly provided that the IA will be liable either contractually or tortiously if he is found to have acted negligently in the course of his determination.

210 Paragraph 4.6 of the Scheme provides that the parties shall have no right to make any claim against the IA for his determination of the dispute, and that will necessarily exclude any claim in negligence against the IA for any lack of due care and diligence in carrying out his expert determination under the Scheme which may have resulted in a loss to any party to the Scheme:

> 4.6 Subject to any mandatory applicable law, the determination of the Independent Adjudicator in respect of any differences or disputes referred to him pursuant to any provision of this Scheme shall be final and binding on the Company and the Scheme Creditor, and **there shall be** no right of appeal therefrom, and **no right to make any claim against the Independent Adjudicator in respect thereof**. [emphasis added]

211 However, paragraph 9.5 of the Scheme appears to state to the contrary that if there is any loss attributable to the IA's own negligence in the course of his expert determination, the IA may be liable for the loss:

> 9.5 No Scheme Creditor shall be entitled to challenge the validity of any act done or permitted to be done in good faith and with due care and diligence by the Independent Adjudicator pursuant to the provisions of the Scheme or in the exercise or performance of any power, right, duty or function conferred upon him under the Scheme and **the Independent Adjudicator shall not be liable for any loss unless any such loss is attributable to his own negligence, wilful default, wilful breach of duty or trust, fraud or dishonesty.**

212 With such contradictory positions in the Scheme, the *contra proferentum* rule will probably apply and an interpretation in favour of the IA will be likely such that the IA may be regarded as immune under paragraph 4.6, which displaces the effect of the proviso in paragraph 9.5. Thus the party suffering the loss may have no remedy if the loss is occasioned by the negligence of the IA in his determination.

213 Accordingly, I am to some extent speculating that the parties to the Scheme may have wisely decided to insulate themselves contractually from such an eventuality by entrenching safeguards in the following paragraphs in the Scheme which expressly stipulate that the IA has to act with due care and diligence and in good faith:

> 9.4 In exercising his powers and rights and in carrying out his duties and functions under the Scheme, **the Independent Adjudicator shall act in good faith and with due care and diligence in the interests of the Scheme Creditors as a whole** and shall exercise his powers and rights under the Scheme to **ensure that the Scheme is operated in accordance with its terms**.
>
> 9 . 5 **No Scheme Creditor shall be entitled to challenge** the validity of **any act** done or permitted to be **done in good faith and with due care and diligence by the Independent Adjudicator** pursuant to the provisions of the Scheme or in the exercise or performance of any power, right, duty or function conferred upon him under the Scheme and **the Independent**

Adjudicator shall not be liable for any loss <u>unless</u> any such loss is attributable to his own negligence, wilful default, wilful breach of duty or trust, fraud or dishonesty.

214 Hence if the IA fails to act with due care and diligence, and an error results from his negligence, paragraph 9.5 of the Scheme expressly entitles the Scheme creditor to challenge the validity of that part of the determination in the same way a Scheme creditor can challenge the validity of any act that the IA has done or permitted to be done in bad faith. Through the above express terms of reference, it is my view that the parties have specifically chosen to expand the scope for challenge to include challenging negligent mistakes made by the IA in the course of his expert determination. This means that the parties have expressly provided for a wider reviewability by the courts for this particular modified form of expert determination by the IA, which will not be limited to material departure from instructions, manifest errors and bad faith, bias, collusion, fraud, breach of trust, dishonesty or the like. The scope of reviewability of the IA's determination is for the parties to decide and specify. The Scheme creditors, in particular OIC, and RNA itself must have known that large commutation sums are going to be assessed and therefore, it is not surprising that all the parties including RNA have decided to expand the reviewability of the decision of the IA by the courts to include negligent errors in determination, thus allowing the determination to be set aside and remitted to the IA for re-consideration on account of any negligent errors. Basically, all the parties do not wish to be bound by any negligent errors in the expert determination as it cannot be predicted where and how the negligent error can arise, which party will suffer a loss as a result of it and what the magnitude of the loss is going to be. The error can potentially affect RNA adversely as much as it can affect the Scheme creditors. The parties therefore agreed to contractually build in the necessary safeguards against negligent errors in the expert determination within the Scheme itself.

215 From a practical point of view, if negligent errors are uncorrectable, then the parties may well be stuck with the consequences of an erroneous expert determination by the IA while at the same time, the parties are also left with no remedy because legally, a negligent claim against the IA is not likely to succeed in view of the contradictory paragraphs in the Scheme in relation to the personal liability of the IA for professional negligence in his determination of the dispute brought to him for his expert determination. I have to make clear that my views in this paragraph are obiter and are completely irrelevant at the hearing of any potential negligence suit brought against the IA.

216 In my view, the Scheme could have been better drafted to remove the contradictions and eliminate the resulting ambiguities. Another instance that the poor drafting may have contributed to a potentially operational deficiency is the incorporation of the "non-speaking" requirement into the expert determination under the Scheme which is generally not going to facilitate an examination of the IA's determination for negligent errors and for subsequent challenge and reviewability by the courts on the ground of such negligent errors. If the parties had wanted proper reviewability of the expert determination for negligent errors, the better approach is to insert an express requirement for the IA to provide a reasoned written determination. It will be much more difficult to determine the existence of any negligent acts on the part of the IA when no reasons or sparse reasons are given by the IA in his determination since he is not required to provide a "speaking" determination. In this respect, the present Scheme may have built in a safeguard that is unsafe.

217 For avoidance of any doubt on my conclusions with respect to the "safeguard" provided in the Scheme of "due care and diligence", I have summarily reviewed the underlying evidence and found that the IA had not acted negligently when he decided the following:

(a) To average the four repair cost estimates provided by IMODCO and Dolan;

(b) That there was no CTL;

(c) That RIL had contributed to the delay in the proceedings in India;

(d) To deduct 3 years of interest on account of RIL's contribution to the delay in respect of the issue of the invasive inspection of the SPM;

(e) To commence the interest accrual from 14 November 2002;

(f) To adopt an interest rate and a discount rate of 13.5% p.a.;

(g) That paragraph 2.2 of the Scheme does not preclude the granting of interest in this case;

(h) To use compound interest instead of the simple interest methodology.

218 However, my view is different with respect to the following **two matters (a) and (b)** below in that the IA had acted without due care and diligence in:

(a) Valuing the contingent liability on the cut-off date as opposed to the Scheme stipulated valuation date of 19 September 2006;

(b) Performing the discount calculations such that only 1.5 years of compound interest is allowed in total.

219 The relevant test I applied to determine that the IA had been negligent on the above **two matters** is the *Bolam* test with "the *Bolitho* addendum" as set out in the two recent Court of Appeal decisions, namely, *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR 513 ("*PlanAssure*") and *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR 460, but modified accordingly to an expert determiner in the insurance field. V K Rajah JA in *PlanAssure* said*:*

The *Bolam* test and "the *Bolitho* addendum"

49 A preliminary point of contention in this appeal relates to the trial judge's failure to consider that the *Bolam* test ([25] *supra*) has since been qualified or clarified by the subsequent case of *Bolitho v City and Hackney Health Authority* [1998] AC 232 ("*Bolitho*"), which "presented a timely addendum to the *Bolam* test" (*Khoo James v Gunapathy d/o Muniandy* [2002] 2 SLR 414 ("*Gunapathy*") at [63]) and required evidence from a body of experts to have a "logical basis" (*Bolitho* at 242).

50 We note that the respondent quite sensibly does not dispute the applicability and relevance of the "logical basis" requirement. It can now be confidently stated that the application of the *Bolam* test is necessarily subject to and qualified by Lord Browne-Wilkinson's statement in *Bolitho* at 241–242 ("the *Bolitho* addendum"), which, when adapted to the context of auditors, would read as follows:

> [T]he court is not bound to hold that a defendant [auditor] escapes liability for negligent [auditing] just because he leads evidence from a number of [auditing] experts who are genuinely of opinion that the defendant's [audit] accorded with sound [audit] practice. … [T]he court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their

views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.

51 The *Bolitho* addendum merely affirms the supervisory judicial responsibility to ensure, at a minimum, that the expert opinion is defensible and grounded in logic and plain common sense. This non-delegable adjudicatory mandate to assess the appropriate standard of care cannot be seriously denied. In this context, we also find the observations of Moffitt J in *Pacific Acceptance Corporation Ltd v Forsyth* (1970) 92 WN (NSW) 29 ("*Pacific Acceptance*") at 75, cited by Ang J in *Gaelic Inns* ([34] *supra*) at [11], particularly pertinent:

> When the conduct of an auditor is in question in legal proceedings it is not the province of the auditing profession itself to determine what is the legal duty of auditors or to determine what reasonable skill and care requires to be done in a particular case, although what others do or what is usually done is relevant to the question of whether there had been a breach of duty.
>
> It follows, if the auditing profession or most of them fail to adopt some step which despite their practice was reasonably required of them, such failure does not cease to be a breach of duty because all or most of them did the same.

52 When assessing whether a professional has been negligent, courts will normally use as their benchmark the common practice within the relevant profession. However, notwithstanding that an expert witness may have considerable professional experience and knowledge about the reasonableness of prevailing standards, the court retains the supervisory responsibility to condemn an unjustifiably lax, albeit common, practice as negligent: see *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] AC 296.

53 In the light of the foregoing, even if the respondent's expert's evidence of the respondent's expert about prevailing standards is accepted, a pertinent consideration is whether these standards fail the *Bolitho* addendum.

220 Although OIC had argued that the IA had not exercised due care and diligence, nevertheless OIC failed to present any other expert opinion on affidavit evidence to show that the IA had been negligent in carrying out his determination. Does it mean that in the absence of such other expert opinion, I will not be able to exercise my judicial supervisory responsibility to ensure that, at the minimum, the IA's expert determination is defensible and grounded in logic and plain common sense under the *Bolitho* addendum? I do not think so. If I am able to find that this minimum is in any event not reached in this case because the IA was plainly and obviously wrong in the above two matters and what was done was indefensible, not logical and against plain common sense**,** then even in the absence of opinions from other experts in the insurance field to say that the IA has been negligent or has fallen below this minimum in his determination, I will be entitled to conclude that the IA has not exercised sufficient due care and diligence in carrying out his determination with respect to the **two matters** above; and for the reasons that I have stated, I do conclude that was the case.

221 Hence, quite apart from the ground of manifest error, I am also remitting the determination back to the IA for re-consideration on this other ground of a lack of due care and diligence on the part of the IA in **performing the discount calculations** (*i.e.* the second matter (b) above). In the course of the re-determination, the IA will have the opportunity of correcting perhaps also the other negligent error of valuing the contingent Scheme claim on the wrong valuation date (*i.e.* the first matter (a) above), which the parties did not have the opportunity to argue. To avoid any doubt, I reiterate that I have not remitted the determination to the IA on the additional ground of a lack of due care and

diligence on the part of the IA in **using the wrong valuation date**.

222 Since I have intervened by remitting the determination to the IA with the consequence that a potential law suit for negligence against the IA has now been avoided in this case, it behoves the IA to take extreme care this time in his re-assessment and valuation to the relevant valuation date and to apply the discount in the correct manner so as to do justice and fairness to the parties, especially when this case involves very large sums of money. To facilitate this, I have appended two sets of detailed sample calculations in the Annexes to this judgment which I hope will provide sufficiently helpful guidance to the IA when he does the re-computation and re-determination of the valuation in accordance with his terms of reference under the Scheme.

Conclusion

223 For the foregoing reasons, the determination is remitted to the IA for his specific re-consideration of the proper discount computation and with an indication that he should also consider valuing the contingent liability at the correct valuation date specified in the Scheme. I have left untouched his determination of the principal sum of US$3,176,178 (before computation of interest) which the IA has determined will have interest at 13.5% p.a. accruing as from 14 November 2002 and not from the date of the loss.

224 Where an expert has answered the right question in the wrong way such that it amounts to a manifest error, then it has to be remitted to him to be corrected. The wrong interest amount allowed by the IA that flowed from the erroneous discount calculation is a manifest error in the determination that justly requires judicial intervention. That error has affected the final quantum of the determination in a very significant way. The error cannot on any account be characterised as trivial or *de minimis*. It was a manifest error that would result in an obvious and serious injustice if left uncorrected by the IA, Mr Law Song Keng, whom I do recognise is a highly experienced and skilled insurance expert with outstanding credentials and an impressive Curriculum Vitae and who has been specially selected for his wealth of experience and expertise and specifically appointed by the parties to resolve and value their Scheme claims strictly in accordance with the terms of the Scheme.

225 I have provided a computation guide or template with detailed explanations on how the calculation of the discount can be effected, which takes into account the discount of the **entire global assessed amount with the accrued interest** up to the likely date of the final court judgment in India, and how the discounting of that global assessed amount back to the correct valuation date can be done. It is however for the IA to relook at the whole interest and discount computation with the guidance I have given and after hearing the further submissions from the parties in order to:

(1) Ascertain the likely date on which the final judgment in India will be delivered;

(2) Compute the likely total judgment sum by adding the principal sum earlier estimated by the IA at US$3,176,168 for the purpose of the Scheme claim to the accrued interest compounded annually at 13.5% p.a. up to the final date of judgment;

(3) Discount that entire global sum back to the Scheme specified valuation date of 19 September 2006 to obtain the valuation of the Scheme claim as at the relevant date specified by the Scheme;

(4) Re-determine and re-stipulate the "Independent Adjudicator's Ascertainment Date" (defined in paragraph 1 of the Scheme) in accordance with paragraph 5.1(b) of the Scheme so that RNA

makes payment to the Scheme creditors no later than 30 days after the "Independent Adjudicator's Ascertainment Date" under paragraph 5.1(a) of the Scheme, unless there is a court order overriding this.

(5) Decide if interest is further to be payable, and if so, the appropriate rate of simple or compound interest to be given on that discounted sum accruing as from the valuation date of 19 September 2006 to the date of actual payment by RNA to OIC in satisfaction of the award.

226 When the principal sum ascertained by the IA is very large at US$3,176,168, and when the interest and discount rate accepted by the IA is set at a relatively high rate 13.5% p.a. (based on the letter dated 16 April 2008 from an Indian law firm attached at **Annex 9** of the IA's determination which states that the courts in India grant interest ranging between 12% and 15 % p.a.), and when the period it is to be applied stretches into a number of years as in this case, then the combination of these three factors (*i.e.* large principal sum, high interest rate and long period of accrual of interest) will have a very significant impact on the final total quantum of the award computed as at the date of the Scheme specified valuation date, and accordingly also on the amount of the final payment to be made at the date of actual payment if further post-award interest is granted from the valuation date to the date of actual payment on the award. For the reasons stated, utmost due care and diligence must be taken in performing the assessment, computation and valuation during the re-determination in order to resolve the entire dispute for the parties.

227 I shall now hear the parties on costs.

ANNEX A

[LawNet Admin Note: Image 1 is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

Mathematically precise calculations based on certain facts found by IA and on certain assumptions

Discount and interest rate adopted by IA: 13.5% p.a. (interest rate/discount factor/time value of money)

[My own estimated date of final decision in India for the purpose of illustration:

14 November 2011 (To be estimated by IA in his re-determination)]

Cut-off date used as the valuation date by IA: 14 May 2007

(Error: Scheme had specified 19 September 2006 instead as the valuation date.)

Interest commencement date: IA allowed interest from 4.5 years prior to cut-off date, *i.e.* 14 November 2002

Principal claim allowed by IA: US$3,176,168

Assumption: The Indian court will similarly find that RIL delayed the inspection and accordingly will deprive
approximately 3 years of interest from the date of writ of 27 October 1999.
Scheme interest therefore also commences on the same date of 14 November 2002.

Amount of simple interest **each year** = 0.135 (*i.e.* 13.5% p.a.) x US$3,176,168

= **US$428,782.68** (the amount of simple interest **in every year**)

Simple interest formula for 1.5 years of interest = US$3,176,168 x 0.135 x 1.5

= US$643,174.02 of total simple interest for 1.5 years

Simple interest formula for final sum after 1.5 years of interest

= US$3,176,168 x (1 + 0.135 x 1.5)

= US$3,819,342.02 (principal sum plus 1.5 years of simple interest)

Compound interest formula used by IA to compute 1.5 years of interest at yearly rest

= US$3,176,168 x ($1.135^{1.5}$ - 1)

= **US$664,415.91** of total compound interest for 1.5 years

Total amount of interest in fact allowed by IA = **US$644,416** (which proves that the IA had used the compound interest formula for interest at 13.5% p.a. compounded at yearly rest for 1.5 years.)

Compound interest formula used by IA to compute the final sum with 1.5 years of interest

= US$3,176,168 x ($1.135^{1.5}$)

= **US$3,840,583.91** (principal sum plus 1.5 years of compound interest at 13.5% p.a.)

Total principal sum plus compound interest allowed by IA

= US$3,176,168 + US$664,416

= **US$3,840,584** (which again proves that the IA had in fact used the compound interest formula to obtain the total principal sum plus interest at 13.5% p.a. compounded at yearly rest for 1.5 years.)

Correct computation of valuation based on 14 May 2007 as the reference valuation date

Using compound interest accruing at yearly rest, the total amount that the court will award (principal sum plus interest compounded yearly over 9 years at 13.5% p.a.) on an accrued claim of US$3,176,168 as at the future date of 14 November 2011 = US$3,176,168 x 1.135^{9} = US$9,928,101.75 on 14 November 2011 [*i.e.* future value as of 14 November 2011 of the principal sum plus 9 years of compound interest at yearly rest.]

To discount the future value of US$9,928,101.75 payable under the Indian court order on 14 November 2011 back to a present day value effective as on the cut-off date of 14 May 2007 = US$9,928,101.75 / **$1.135^{4.5}$** = **US$5,615,453.59** [*i.e.* present value of the principal plus interest as on 14 May 2007, which mathematically assumes payment on 14 May 2007 without any delay.] The

discount period from 14 November 2011 back to 14 May 2007 is 4.5 years, which explains the use of the figure in bold and underlined in the **divisor** above of $\mathbf{\underline{1.135^{4.5}}}$ in the discount formula.

Basically, the total interest that should be allowed is US$5,615,453.59 – US$3,176,168 = **US$2,439,285** instead of US$664,416 as computed by the IA.

This interest computed of US$2,439,285 is equivalent to US$2,439,285 / US$428,782.68 = **5.689** years equivalent of simple interest.

Effectively the 9 years period is conceptually reduced by or discounted by **3.311** years to obtain the equivalent of 5.689 years of simple interest.

The 3.311 years of discount that I arrived at above is in fact very close to the 3 years of discount used by the IA. Hence, the discount of 3 years as a numerical number used by the IA is in my view fair for a discount of the future Indian court judgment sum expected on 14 November 2011 back to the valuation date assumed by the IA as 14 May 2007.

Let me now adopt the same 3 years discount that the IA had in fact used in his determination to compute the amount payable under the Scheme (instead of the 3.311 years discount that I had accurately computed on a mathematical basis). The manifest error is in subtracting the 3 years discount from the period of 4.5 years from the start date 14 November 2002 to the cut-off date of 14 May 2007, thereby giving only **1.5 years of interest.** The IA ought to have subtracted the 3 years discount from the whole 9 years from the start date 14 November 2002 to the date expected of the Indian court judgment on 14 November 2011, which would have given **6 years of interest**. As can be seen from the time line above, RNA would have been entitled anyway to the accrued past interest of 4.5 years that had accruing continuously for the past period from 14 November 2002 (actual allowed interest commencement date by IA) to 14 May 2007. To discount a past period's interest of 4.5 years again by deducting 3 years from it is to commit a manifest error of a double discount.

Essentially, the manifest error is to have ignored the fact that the US$3,176,168 was also earning interest for the prior or past 4.5 years from 14 November 2002 to the cut-off date.

The subtraction of 3 years should therefore be for the whole period of 9 years (from 14 November 2002 to 14 November 2011), giving 6 years of interest to be allowed instead of the erroneous 1.5 years of interest eventually allowed by the IA.

Accordingly, the total interest that should have been allowed is 6 years x US$428,782.68 of simple interest p.a. = US$2,572,696.

Total scheme claim correctly valued as at the cut-off date of 14 May 2007 = US$3,176,168 (*i.e.* principal sum) + US$2,572,696 (*i.e.* 6 years of simple interest) = **US$5,748,864 (the approximate amount based on 3 years discount used by the IA**).

More precisely, the total scheme claim correctly valued as at the cut-off date of 14 May 2007 should be based on 3.311 years of discount = US$3,176,168 (*i.e.* principal sum) + US$2,439,285 (*i.e.* 5.689 years of simple interest) = **US$5,615,453.59 (the exact amount based on 3.311 years discount)**

Conclusion

The manifest error in the IA's mathematical computation is very substantial as the difference between

the correct amount and the wrong amount is US$5,748,864 – US$3,840,584 = **US$1,908,280 (based on a 3 years discount used by the IA)**.

If the mathematically more precise 3.311 years of discount were to be used, then the manifest error in mathematical computation results in a slightly smaller difference, which is nevertheless still very substantial at US$5,615,453.59 – US$3,840,584 = **US$1,774,869.59 (based on a 3.311 years discount that I have computed**).

The above calculations seem very long only because of the detailed explanation in order to achieve clarity. An accountant or mathematician can readily verify the above and can compute very quickly in only a few steps to get the correct mathematical answers based on the same facts and figures used by the IA in his discount computation and valuation of the Scheme claim as at the cut-off date. Counsel would be well advised to consult a professional accountant or mathematician if these calculations cannot be understood.

(P.S. In these calculations, the discount for the principal sum has been fully factored inside and accounted for. These calculations discount **both** the principal sum and the accrued compounded interest as a total lump sum payable in India on 14 November 2011 back to 14 May 2007 to take account of the advance payment on the cut-off date itself.)

Alternative simple calculation

If the principal sum is accruing compound interest at 13.5% p.a. starting from 14 November 2002 and ending on 14 November 2011, and if the total sum (principal plus accrued compound interest) is then discounted back at the compound discount rate of 13.5% p.a. back to the cut-off date of 14 May 2007, it is then simpler just to calculate the principal sum plus compound interest at 13.5% p.a. from 14 November 2002 to 14 May 2007 (which is a period of 4.5 years). The answer derived from the alternative simple calculation will be identical with the answer obtained from the above far more complex computation. This can be proven mathematically but I shall not do so here.

Amount of principal claim plus compound interest at 13.5% p.a. payable on 14 May 2007 = US$3,176,168 x $1.135^{4.5}$ = US$5,615,453.59 as of value date on 14 May 2007 for payment on value date itself (which is equal to the exact amount based on 3.311 years of discount in the above more complicated computation). I call this the "simple formula". One gets the same answer much quicker this way. In mathematics, there can sometimes be alternative shorter and better methods of calculation to arrive at the same answer.

I note that the IA had in fact used the same "simple formula" as I have used here except that he computed the compound interest for only 1.5 years and added it to the principal sum as follows: US$3,176,168 x $1.135^{1.5}$ = US$3,840,584 (which is identical in amount with what the IA had calculated to be the final total award for his valuation as at the cut-off date).

As explained earlier, it is a manifest mathematical error to apply a further discount by subtracting 3 years from the 4.5 years and use instead 1.5 years in the "simple formula" as that would amount to a double discount, which was essentially what the IA had done.

One uses either the more complicated computation method or the alternative "simple formula". One must not use a mixture of both as the IA had done, as that would be mathematically illogical and erroneous, and would result in a double discount.

ANNEX B

[LawNet Admin Note: Image 2 is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

Valuation as at the stipulated valuation date

In the re-determination, the IA will have to re-compute the valuation to the correct date *i.e.* the Scheme specified valuation date of 19 Sep 2006 by simply performing the discounting calculations to the correct date, leaving the principal sum unchanged. For the reasons I have stated, **the principal sum determined is not affected by this mistake of the IA and hence, the material departure from the instructions in the Scheme will not invalidate the IA's determination of the principal amount of US$3,176,168 (before interest).**

Although this principal sum of US$3,176,168 (before interest) is premised on an exchange rate of US$1= INR40.9 as on 14 May 2007 (the cut-off date) and although it might first appear that there is a need to adjust for any change in the exchange rate for a valuation on a different date *i.e.* the valuation date of 19 September 2006 and to re-compute the principal amount accordingly if the exchange rate is different, fortunately on the facts of this case it is not necessary to do so because the IA had used the average of the four estimated repair costs which were provided by IDODCO and Dolan in US$ and not INR. If it were otherwise, then adjustments to the principal sum on account of the exchange rate difference between the two dates would have to be made.

However there may be other issues and adjustments that I am not able to foresee at the moment. No doubt the parties will assist the IA through their detailed submissions and no doubt the IA will use his expertise and undertake the fresh task remitted to him with utmost due care and diligence to ensure that no further of errors of any kind are made, lest there be more applications for further reviews by the court and further delays to all Scheme creditors. I do not think this is something that the parties and the IA will relish.

Since I have already remitted the discount calculations and the final figure to the IA to re-compute, the IA will therefore have the opportunity to review his discount calculations to obtain the proper valuation figure at the correct valuation date once and for all, and avoid another unnecessary application by the parties to the court.

The detailed sample calculations that follow will hopefully guide the IA on how the re-computation of the valuation of the contingent liability/Scheme claim of OIC as at the correct valuation date may be made, while keeping undisturbed the other findings made by the IA with respect to:

(a) the principal sum of US$3,176,168 based on his averaging methodology of the four estimated repair costs provided in US$ by IMODCO and Dolan;

(b) the interest and discount rate fixed by the IA at 13.5% p.a.;

(c) the IA's denial of 3 years of interest on account of his assessment of RIL's contribution to the delays in the trial process in India due to the dispute over the invasive inspection of the SBM;

(d) the IA's use of the compounding methodology and formula for the computing the interest and the discount.

These findings and methodology of the IA are to remain binding on the parties and should not be re-determined as I have not found any manifest or patent error nor any material departure from

instructions committed by the IA in the course of his earlier expert determination. Furthermore, one also has to bear in mind that the whole purpose of an expert determination is the advantage of cost, speed and finality as envisaged by parties. On a practical level, it is pointless to re-visit these concluded matters.

Thus, I have only set aside the discounting computation but left intact the valuation of the principal sum of the loss of US$3,176,168 (before interest). For the discount re-computation, the interest at 13.5% p.a. is deemed to start accumulating at a later date on 14 Nov 2002 as found by the IA because of the contributory culpability of RIL in delaying the invasive inspection of the SPM. The end date for the interest accumulation is the likely date that the future judgment will be rendered by the Indian court. The total estimated judgment sum plus interest to date of judgment will have to be discounted to the present value as at the valuation date of 19 Sep 2006 to obtain the correct valuation of the Scheme claim as at the Scheme specified valuation date. For avoidance of doubt, I set out below exactly how the re-computation may be done so that the parties and the IA are clear on the correct mathematical process of calculating the discount.

Mathematically precise calculations based on the same facts found by IA to value the contingent liability as at the correct valuation date of 19 September 2006

Discount and interest rate adopted by IA: 13.5% p.a. (interest rate/discount factor/time value of money)

[My own estimated date of Final Decision in India for the purpose of illustration:

14 November 2011 (To be estimated by the IA in his re-determination)]

Valuation date: 19 September 2006 (This is the correct valuation date to use for discounting the amount likely to be awarded by the Indian court on 14 November 2011 back to the Scheme valuation date of 19 September 2006.)

Interest commencement date: IA allowed interest from 4.5 years prior to cut-off date, *i.e.* 14 November 2002

Principal claim allowed by IA : US$3,176,168

Assumption: The Indian court will similarly find that RIL delayed the inspection and accordingly will deprive approximately 3 years of interest from the date of writ on 27 October 1999. Scheme interest therefore also commences on the same date of 14 November 2002.

Amount of simple interest each year = 0.135 (*i.e.* 13.5% p.a.) x US$3,176,168 = **US$428,782.68** (the amount of simple interest in every year)

IA computed a compound interest for 1.5 years at 13.5% p.a. using the compound interest formula

= US$3,176,168 x ($1.\mathbf{135}^{\mathbf{1.5}} - 1$)

= **US$664,416.**

Compound interest formula used by the IA to compute the final sum with 1.5 years of interest

= US$3,176,168 x ($1.\mathbf{\underline{135}}^{\mathbf{\underline{1.5}}}$)

= **US$3,840,583.91** (principal sum plus 1.5 years of compound interest at 13.5% p.a.)

Total amount allowed by IA is US$3,176,168 + US$664,416 (of compound interest for 1.5 years) = **US$3,840,584** (which proves that the IA had in fact used the compound interest formula to obtain the total principal sum plus interest at 13.5% p.a. compounded at yearly rest for 1.5 years.)

Correct computation (but with the valuation of Scheme claim of OIC on the correct Scheme specified valuation date of 19 September 2006)

Using compounded interest accruing at yearly rest, the total amount that the court will award (principal plus interest compounded yearly over 9 years at 13.5% p.a.) of an accrued claim of US$3,176,168 on the future date of 14 November 2011 = US$3,176,168 x $1.\mathbf{\underline{135}}^{\mathbf{\underline{9}}}$ = US$9,928,101.75 on 14 November 2011 [*i.e.* future value as of 14 November 2011 of the principal plus 9 years of compound interest at 13.5% p.a. yearly rest.]

To discount the future value of US$9,928,101.75 payable under the Indian court order on 14 November 2011 back to the present day value effective as on the Scheme specified valuation date of 19 September 2006 = US$9,928,101.75 / $1.135^{\mathbf{\underline{5.1666}}}$ = **US$5,160,889.98** [*i.e.* present value of the principal plus interest as on 19 September 2006, which mathematically assumes payment on the valuation date of 19 September 2006 without any delay.] The discount period from 19 September 2006 to 14 November 2011 is 5 years 2 months or 5.1666 years which explains the use of the figure in bold and underlined in the **divisor** above of $1.135^{\mathbf{\underline{5.1666}}}$ in the discount formula.

Basically, the total interest to be allowed should have been US$5,160,889.98 – US$3,176,168 = **US$1,984,722** instead of US$664,416 as computed by the IA.

This interest computed of US$1,984,722 is equivalent to US$1,984,722/ US$428,782.68 = **4.628736** years equivalent of simple interest.

Effectively the 9 years is conceptually reduced by or discounted by **4.371264** years to obtain the equivalent of **4.628736** years of simple interest.

Basically, 4.371264 years of discount must be taken off from the 9 years period (between 14 November 2002 and 14 November 2011) to arrive at the 4.628736 years of simple interest allowed as at the Scheme specified valuation date of 19 September 2006.

The IA should award the following: (a) **principal sum of US$3,176,168** plus (b) 4.628736 years of equivalent simple interest at 13.5% p.a. *i.e.* 4.628736 x 0.135 x US3,176,168 = **US$1,984,722 interest**.

The total sum the IA should award (comprising the principal sum US$3,176,168 plus US$1,984,722 interest) is therefore **US$5,160,890 as at the Scheme specified valuation date of 19 September 2006**. This total sum is equivalent to the judgment sum if a judge in the Singapore were to hear and value RNA's share of OIC's contingent liability to RIL arising from RIL's claim in India as at the valuation date or discounted to the valuation date.

Conclusion

The manifest error in the IA's mathematical computation is very substantial as the difference between the correct amount valued at the correct Scheme specified valuation date and the wrong amount assessed by the IA is US$5,160,890 – US$3,840,584 = **US$1,132,306**.

I reiterate that the above calculations seem very long only because of the detailed explanations in order to avoid any ambiguity and misunderstanding. I repeat that an accountant or mathematician can readily verify the above and can compute very quickly in only a few steps to get the correct mathematical answers based on the same facts and figures used by the IA in his discount computation and valuation of the Scheme claim as at the cut-off date. Counsel would be well advised to consult a professional accountant or mathematician if these calculations cannot be understood.

(P.S. I emphasise again that the discount for the principal sum has been fully factored inside and accounted for in the above calculations. These calculations discount **both** the principal sum and the accrued compounded interest as a total lump sum payable in India on 14 November 2011 back to 19 September 2006 to take account of the advance payment on the Scheme specified valuation date itself.)

Post-award interest

On another point, judgment sums before a court in Singapore normally do carry an entitlement to post-judgment interest of 5.88% p.a. from the date of judgment to the date of actual payment. In this case, the valuation amount for the Scheme claim of RIL should be treated as being equivalent to a "judgment sum" awarded by the court on 19 September 2006.

Due to the various delays, RIL has still not been paid. It may be unfair or even unconscionable for RNA to benefit from the delays in payment of a very large award. OIC will likely be suffering from a substantial loss of compound interest on this huge "judgment sum" or of US$5,160,890 payable as from the valuation date on 19 September 2006. As at the date of this judgment in December 2008, more than two years have since passed and yet this "judgment sum" is still unpaid. If this matter goes on appeal, the payment by RNA to OIC may be further delayed much to the detriment of RNA. If it had been a court judgment, interest would be accruing at 5.88% p.a. on the judgment sum unpaid till date of payment.

I note however that the IA made no mention in his earlier determination on whether his award is to carry any interest to the date of actual payment.

It is therefore for the IA to further consider this issue of the post-award interest (from 19 September 2006 till the actual date of satisfaction of the award) to be calculated on the total award that he is re-determining. With such a long delay on the payment of a very substantial sum, the IA will have to exercise his discretion whether to award any post-award interest on the final total award to be computed up to the date of payment and if so, then at what interest rate and whether it should be simple or compound interest so that there is fair and equitable compensation despite the long delay in resolving the Scheme claim of OIC. Should the IA also adopt the normal 5.88% p.a. simple interest that the court in Singapore normally grants on post-judgment interest or use some other interest rate in view of the current low interest rate environment in Singapore? This is a matter entirely for the IA to decide.

Paragraph 2.2 of the Scheme makes clear that where the exception applies, as in this case where the contingent claim is one that will be pursuant to a court order that is likely to carry interest, then the

Scheme creditor shall be entitled to claim interest for the period up to one day before actual payment in satisfaction of the amount determined by the IA in his award. The prohibition in paragraph 2.2 against payment for interest in respect of a Scheme claim is inapplicable when the exception applies *i.e.* in a case where the liability under the Scheme claim arises from a court order/judgment sum, which is likely to carry interest to the date of actual payment by the judgment debtor.

It will be helpful to the parties for the IA to complete the whole process of determination and bring the dispute to a full closure by covering all relevant issues needed to finally resolve the Scheme claim. The IA should not just leave this remaining aspect of his award silent *i.e.* whether post-award interest is payable on the amount to be awarded in his re-determination until the date of actual payment. Parties will then have a satellite dispute over this undetermined aspect of the post-award interest unless the IA has made clear to them what, if any, is the post-award interest payable on the outstanding unpaid award till the date of actual satisfaction of the entire award.

Parties will no doubt have to further assist the IA on this additional issue of post-award interest.

Alternative simple calculation

If the principal sum is accruing compound interest at 13.5% p.a. starting from 14 November 2002 and ending on 14 November 2011 and if the total sum (principal plus accrued compound interest) is then discounted at the compound discount rate of 13.5% p.a. back to the Scheme specified valuation date of 19 September 2006, it is then much simpler just to calculate the principal sum plus compound interest at 13.5% p.a. from 14 November 2002 to 19 September 2006 (which is a period of 3 years 10 months or **3.8334 years**). The answer will be exactly the same as the above more complicated calculation and this can be proven mathematically but I shall not do so here.

Amount of principal sum plus compound interest at 13.5% p.a. payable on 19 September 2006 = US$3,176,168 x $\mathbf{1.135^{3.8334}}$ = **US$5,160,890** as of valuation date on 19 September 2006 for payment on the Scheme specified valuation date itself (which is equal to the exact amount based on 4.371264 years of discount in the above more complicated computation). I call this the "simple formula". One gets the same answer much quicker this way. In mathematics, there can sometimes be alternative shorter and better methods of calculation to arrive at the same answer.

I note that the IA had also used the same "simple formula" as I have used here except that he computed the compound interest for 1.5 years and added it to the principal sum as follows: US$3,176,168 x $\mathbf{1.135^{1.5}}$ = US$3,840,584 (which is in fact the IA's final total award for his valuation as at the cut-off date).

If the mathematically erroneous methodology of the IA were to be similarly followed, but this time using the correct valuation date of 19 September 2006, then the 3 years of discount must be subtracted from the 3.8334 years (based on the period between 14 November 2002 and 19 September 2006) which then gives a ridiculously low allowable period of interest of 0.8334 years or only 10 months of interest. It is patently obvious that for an accident which had happened many years ago, and on any gut feel, the 10 months of interest to be allowed for the valuation of the Scheme claim as at 19 September 2006 cannot possibly be right. It plainly is an illogical conclusion that no expert doing the discounting sums carefully would ever have come to on the facts of this case.

Basically, after this same "simple formula" is applied on the **3 years 10 months** or **3.8334 years** at the compound interest of 13.5% p.a. (*i.e.* covering the period from 14 November 2002 to 19 September 2006) to compute the valuation at the Scheme specified valuation date of

19 September 2006 for payment of that valuation amount on 19 September 2006 itself, then applying a further discount by subtracting 3 years from the 3.8334 years amounts to a double discount, which was what the IA had done.

In other words, one cannot apply a second discount by subtracting 3 years from the 3.8334 years and then end up with the very small balance of 0.8334 years or 10 months to award as interest to RIL. This double discount was the specific manifest error in the IA's discount computation. With such a long delay, how can it be possibly right that the computation turns out only 10 months of allowable interest if the IA's method of computation was indeed correct? This confirms once again that a valuation of the Scheme claim as at the Scheme specified valuation date using the IA's methodology, which is going to allow only 10 months of interest in total (*i.e.* less than 1 year interest) to RIL, is obviously and manifestly fallacious.

One uses either the more complicated computation method or the alternative "simple formula". One must not use a mixture of both as the IA had done, as that would be mathematically illogical and erroneous and it results in a wrongful double discount, which therefore gives an extremely low figure for the period of allowable interest, such as 10 months with the IA's discount methodology.

Accordingly, the IA has to re-compute using the correct discount methodology.