

**The Home Insurance Company Informal Creditors Committee Meeting**

21 October 2003

**Agenda**

1. **Introduction – Gareth Hughes**
  - a. People Present
  - b. Aim of the meeting
  - c. Agenda and purpose of the informal creditors committee
2. **Background and Financial Position – Pete Bengelsdorf**
  - a. Worldwide Structure of Home
  - b. Financial Information
3. **The Liquidation of Home – David Leslie**
  - a. The New Hampshire liquidation
  - b. Statutory framework
  - c. Procedures:
    - i. Filing and determination of claims
    - ii. Filing of contingent claims
    - iii. Priority of claims
    - iv. New Hampshire classes of creditor
    - v. Set-off
  - d. Timetable
4. **ACE-INA Business Assumption – John Curran/Sarah Ellis**
  - a. Portfolio transfer
  - b. ACE-INA
  - c. AFlA financial position
5. **The UK Provisional Liquidation – Gareth Hughes/Phillip Hertz**
  - a. Powers
  - b. Additional responsibilities regarding UK creditors
  - c. Issues facing the Provisional Liquidators:
    - i. The Insurers (Reorganisation and Winding Up) Regulations 2003
    - ii. Do the provisions apply to the UK Branch?
    - iii. Can worldwide creditors prove in a UK procedure?
    - iv. Are there any advantages to UK creditors of a UK Scheme of Arrangement?
  - d. Costs of the UK Provisional Liquidation.
6. **Proposed Way Forward – Gareth Hughes**

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## MINUTES OF THE INFORMAL MEETING HELD ON OCTOBER 21 2003

*Minutes of the FIRST Meeting of the Informal Creditors Committee  
The Home Insurance Company (In Provisional Liquidation)*

*At 9:30a.m.*

*Held in the Offices of Clifford Chance LLP  
10 Upper Bank Street, London E14 5JJ*

Attendees: See attached schedule

### Introductions, Agenda and New Hampshire Procedures

Mr Roger Sevigny (Insurance Commissioner of New Hampshire) gave an overview that the aim of the US liquidator to:

- act on behalf of worldwide creditors,
- come to practical businesslike solutions
- address any issues that the English creditors have

Mr Gareth Hughes (Joint Provisional Liquidator in the UK) reiterated the commercial solution stance of the Provisional Liquidators and said that the aim of the meeting is to educate creditors on the complex UK scenario. He stated that he is ancillary to the UK proceeding as there is no separate legal entity in the UK. Mr Hughes explained that his remit is to protect assets for the benefit of worldwide creditors and he will not remit assets in to a global proceeding until he is satisfied that the UK Branch creditors are not disadvantaged.

Mr Peter Bengelsdorf (CEO of The Home Insurance Company) gave an outline of the financial position of the US Estate. The estate has been active in collecting cash (this has gone up from \$8m (when Mr Bengelsdorf was appointed) to \$325m on liquidation date. Outside actuarial valuations on the date of liquidation indicated that The Home was insolvent by \$692m as at the date of the appointment of the US Liquidator. There is no current estimated value of the estate but is expected to be a "high pay out estate". Mr Bengelsdorf also re-emphasised that this is a new estate and clarity on the financial position will come with time.

Mr Steve Goodlud (representing Slater Walker) asked what percentage of creditors are reinsurance creditors as opposed to direct creditors. Mr Bengelsdorf stated he believed about 90% of the creditors are direct.

Mr David Leslie (of Rakemann, Sawyer and Browster, legal advisors to the Home in the USA) explained the statutory framework for Insurance in the USA, with each state being self regulated. In this case New Hampshire is the state where the Home is domiciled, thus the Commissioner from this state is the Liquidator of the estate (Mr Sevigny). Mr Leslie said that the US and UK regime are closely aligned as is detailed in 'the matrix', a documents comparing the New Hampshire and UK insolvency procedures, which will be shared with the Committee.

Mr Leslie said Proof Of Claim (POC) forms are preferred by the Liquidator by claims could be submitted in other ways. Late filing will be allowed in circumstances beyond the creditors control or if the creditor did not know about a particular claim. The liquidator will take a commercial outlook to late filings.

Mr Peter Roth (attorney advising Mr Sevigny) stated that Liquidator does not wish to burden a small town court with lots of litigation; this is another reason why commercial settlements will be sought.

Mr Leslie informed creditors that the quarterly reports/pleadings to court are available on the web; this helps make the process as transparent as possible.

Mr Leslie also confirmed the estate would accept placeholder claims, where the claims of a contingent nature, this allows Home to identify who the claimants are. These claims will subsequently be firmed up by estimation or court determination and explained that priority of claims is the same as the UK in a post April 20th environment. In addition Mr Leslie confirmed that all the creditors at the table would rank below the US direct creditors.

Mr Roth added to this by explaining that reinsurers do have set-off rights in New Hampshire and once contingent claims are valued they can be used for set-off.

The Topic of the New Hampshire Procedures was opened to the floor and the following discussions took place:

*Exception rules*

Mr Rhydian Williams (representing Equitas) asked whether the "exception" rules above means that the filing deadline is only applicable for putting names and addresses etc in to the estate and the claims can be made absolute. Mr Leslie said he expected creditors in good faith to present their claims.

*Referees*

Mr Williams asked, where a referee is used to determine a claim, who this would be? Mr Roth said they are appointed by the New Hampshire court and are usually retired judges.

*Estimation Process*

Mr Willimas asked for more clarification around the "estimation" process. Mr Roth said it allows firming up of claims for the purposes of commutations etc. Mr Williams observed that the "estimation" process allows liabilities to be firmed up and agreed before the natural end of the agreement. Mr Leslie reiterated that this allows proceedings of the estate as a whole to come to a swifter end. He also noted that the reinsurance is only payable to the extent that The Home has agreed an inward claim, whether it be by any of the methods questioned above.

*ACE-INA and Claims*

Mr Hughes wondered whether ACE-INA would accept such a claim on their reinsurance. Mr Jonathan Rosen (COO of the Home Insurance company) said ACE has the right, under the "Insurance and Reinsurance Assumption Agreement" ("Assumption Agreement") to help in the agreement of claims.

Mr Leslie said an "agreed" figure could be imposed on ACE if it were accepted by the court and a court order granted. Mr Roth added that ACE would be invited to participate in the agreement of such disputed claims.

Mr Trevor Rawlings (representing Horizon) asked when ACE looked at claims. Mr Rosen said that they should be adjusting claims in the normal course, but can't pay them, as the Liquidator has the final call on this. ACE should also make the initial determination on contingent claims.

Mr Goodlud said Ace are generally under-resourced and devote fewer resources than are needed to these areas.

*Other*

Mr Goodlud asked about debt trading. Mr Leslie said this is cannot be done to gain a set-off advantage under New Hampshire laws.

Ms Lorna Hemsley (representing Sphere Drake) asked whether any distinction between domicile of creditors. Mr Leslie confirmed not.

Mr Williams asked whether there are any reinsurance creditors in Canada, and if so how are they treated? Mr Bengelsdorf explained the unique circumstances in Canada in that he thought there was and believed that there would be a 100% return for these creditors in Canada but this was not clear. The Canadian deposits were held on trust and the good investment income made by this branch meant that it was solvent. Mr Leslie agreed to check the position of the Canadian Reinsurance creditors and advise the committee of the position and the reasons for the different treatment.

#### **AFIA Pool**

Mr John Curran (of Clifford Chance, legal advisors to the Home Insurance Company in the UK) talked through the pre and post purchase structure as sent to the creditors prior to the meeting. He explained that BAFCO was owned and capitalised by AFIA to protect the pool members against the growing problems of the Treaty Business in the early 1980's.

Mr Williams made an observation that effectively this is a self re-insurance by AFIA but just going through a separate legal entity domiciled in Bermuda for tax purposes. Mr Curran questioned whether the BAFCO reinsurance transferred to INA as part of the assumption agreement. JC says he thinks it stays with The Home.

Mr Rawlings noted that AETNA is a CIGNA company and also a member of the AFIA pool leading to added complexity.

#### The Topic of the AFIA Pool was opened to the floor and the following discussions took place:

Mr Goodlud asked who owned BAFCO. Mr Curran informed the committee it is an ACE company (now called Century International Reinsurance Company (CIRC)).

Mr Richard Leedham (representing Continental Insurance Company of New York) asked whether the "other reinsurances" as shown on the "pre purchase" slide transferred to INA as part of the assumption agreement. Mr Curran confirmed that they did.

Mr Williams noted that the "BAFCO III" agreement left no need for the assumption agreement as BAFCO pay all the claims. Mr Curran refined this a little saying there are 2 possible paths (INA and BAFCO) that will clear all losses.

Mr Williams asked why the XOL on "London Losses" is 90% of \$335-\$600m and not 100%. Ms Sarah Ellis (of the UK Provisional Liquidators office) speculated that this is because AETNA is a CIGNA company and thus ACE recovers net.

#### **Portfolio Transfer**

Mr David Steinberg (of Clifford Chance) discussed this matter, and took the creditors through the Legal advice that had been provided to Home in 2001 by Lebocuf, Lamb, Greene and Macrae (LLGM), which addressed whether there was any action Home could take to force ACE to complete the transfer. DS confirmed that LLGM advised that the matter was time barred. He discussed whether the FSA had powers under FSMA 2000 to enforce this transfer retrospectively. Mr Steinberg advised that although he believes that technically they do, he

considers it very unlikely the FSA would evoke such powers to enforce the transfer at this time.

The Topic of the Portfolio Transfer was opened to the floor and the following discussions took place:

*Legal Advice*

Mr Gemot Warmuth (representing Agrippina) wanted the legal advice on the above shared with the ICC. Mr Steinberg confirmed that the creditors could have the advice in short order. In addition Mr Steinberg confirmed that the FSA had received no paper on this subject yet, but he would be happy to prepare one.

Mr Leedham asked whether Clifford Chance had done a detailed analysis of the reasons why the transfer had not been completed as these reasons may assist the creditors to put pressure on the regulator. Mr Steinberg said that the view of the liquidators was that as any action was statutory barred, the cost of further analysis could not be justified at this time. On this point Mr Hughes was sceptical that all facts would emerge at this late stage if we were to do a detailed investigation.

*Why Transfer not Enforced*

Mr Steinberg imagined that the DTI may not have enforced the transfer because at the time the balance sheet of The Home looked better than that of CIGNA, thus it was felt that creditors' money was safer in The Home. Mr Rosen urged creditors to remember that this was not an absolute contract but a "best efforts" contract that was never completed.

Mr Goodlud noted that the FSA would also have to bear in mind ACE policy holders when considering whether to enforce portfolio transfer today.

**ACE-INA**

Ms Ellis took the creditors through the position with ACE-INA regarding their ongoing responsibilities, the discussions with the Provisional Liquidators and the matter of a possible commercial resolution with ACE. She ran the creditors through the financial position of the AFIA book (run off by ACE-INA) and advised that the PLs are concerned at the apparently significant difference between ACE's paid and Loss Reserves and figures being shared with the PLs by cedants. She confirmed that the PLs urgently need cedants to provide them with full details of their reserves so that a reconciliation can be done in order to establish the accuracy and completeness of ACE's records.

The Topic of the ACE-INA was opened to the floor and the following discussions took place:

Mr Williams asked whether BAFCO is the first port of call for reinsurance. Ms Ellis confirmed that it was with ACE paying the claim and subsequently billing BAFCO (now CIRC).

Mr Hughes reiterated that we are keen to get numbers in from cedants and drill down into the numbers that ACE's systems are showing. This is important for the Liquidators to educate themselves as to the potential shortfall in ACE's reserving etc. for the purposes of discussions relating to commercial resolutions with ACE in the future.

Mr Goodlud asked what the latest actuarial view of the reserves is. Mr Hughes said EY actuaries gave a higher final figure than the more comprehensive Millimans review, however no full review has been done.

Mr Goodlud said the ACE are difficult and are top of the reinsurance league table for queries. ACE write-off time barred claims from their books; this may explain some of the differences. Mr Hughes re-iterated this point stating that there are difficulties with the ACE books in several significant areas: commutations, time bar, broker representations and disputes are some of these. Mr Williams asked could we assume that the Provisional Liquidation stops time running for time bar purposes. Mr Steinberg said not. Mr Williams further asked whether the appointment of a liquidator in aid New Hampshire stops time running. Mr Leslie said he would revert to the ICC on this matter.

#### **The UK Provisional Liquidation**

Mr Philip Hertz and Mr David Steinberg (both of Clifford Chance) took the creditors through the powers of the UK Provisional Liquidators and their remit.

#### **Global vs Dual Proceedings**

Mr Hertz told the creditors that a comprehensive review on the question of a Global versus area had been done by Clifford Chance in London along with Rakemann, Sawyer and Brewster in New Hampshire. The comparative advantages of each course of action have been looked at. In addition to the above a comparison of UK law to New Hampshire law had been done, this resulted in a "Matrix" that will be distributed to creditors in due course (subject to the retention of privilege etc).

Mr Steinberg then discussed the Insurers (Reorganisation and Winding Up) Regulations 2003 and whether they apply to The Home. He concludes that they do because they cover Insurance debts of a 3<sup>rd</sup> country insurer (The Home is 3<sup>rd</sup> country insurer as defined in the Act) in any proceedings after 20<sup>th</sup> April 2003. Thus the priority rankings specified in this Act will apply. Until 20<sup>th</sup> April, direct insurance creditors did not rank above reinsurance creditors in the UK.

Mr Hughes made the additional point that the application of the above legislation goes to the authorisation granted by the regulator and not the actual business carried out, thus the fact that the Home did little (if any) direct business is not important for these purposes, as it was authorised to do so by the FSA.

#### **The Topic of the Global vs Dual Proceedings was opened to the floor and the following discussions took place:**

##### *Ranking of Direct Creditors in New Hampshire*

Mr Warmuth questioned the class 5 ranking of reinsurance creditors in New Hampshire as he says that the model act was drafted with a sentence making clear that reinsurance creditors rank in class 5, but this was taken out of the New Hampshire act, thus suggesting that they do not rank in this category in New Hampshire. In addition there is no case law to back this up. Mr Leslie did not disagree with this, but said that this statutory language in New Hampshire was not unique for US states, he believes that US case law strongly backs up this class 5 ranking. DL said he would put together a paper on this for the creditors. He further stated that no Insurance Commissioner in the US would say that reinsurance creditors rank in class 2. Mr Warmuth said the model act was first, followed by the New Hampshire act omitting the reinsurance sentence in class 5, thus it was taken out for a reason.

Mr Leslie inquired whether Mr Warmuth's New Hampshire counsel thought his argument was likely to be correct? Mr Warmuth said not but he wanted to raise the point. Mr Leslie agreed to provide a paper for the ICC on these issues.

*What Designates the Ranking?*

Mr Williams asked whether it is the status of the creditor or the underlying transaction that ranks. Mr Rosen confirmed that the whole process is contract driven.

*Counsel Advice*

Mr Hughes said that all the discussed opinion on the single vs dual liquidation issues have been backed up by counsel (QC Robin Knowles). Mr Steinberg said that although English law allows assets to be ring fenced if creditors in the UK are disadvantaged (as in the case of BCCI), this could not be done if the disadvantage could not be proven to the Court. The advice received suggests that there is no disadvantage to UK Branch creditors of one US Liquidation.

Mr Leedham asked if the ICC could have a copy of Counsel's advice. Mr Hughes said yes, subject to the normal privilege.

*Timing of Distribution*

Mr Williams asked whether the timing of distribution is a key issue in deciding on 1 vs 2 proceedings. Mr Hughes said that it is, in particular with the FSA. Mr Leslie agreed with this saying that the success of the liquidation depended on payments being made on a timely basis and that he was very mindful of this.

*Property and Casualty Liquidations in New Hampshire*

Mr Williams asked if there had ever been an insurance liquidation in New Hampshire. Mr Sevigny said not a "Property and Casualty" case. Mr Leslie said there have been "Property and Casualty" cases in other states, sufficient to give the US team precedent to fall back on.

*ACE-INA - Conflict of Interests*

Mr Warmuth raised the conflict of interest that ACE-INA have in running off the AFIA book as well as reinsuring it. He understood that there is an adjudication process in place, but is this enough? Mr Hughes said that there are "checks and balances" in the process but he is mindful of not telling ACE what they can and can't do because this could lead to a repuditory breach of the assumption agreement. Mr Hertz re-iterated that Mr Hughes can't put too many conditions on ACE as all their obligations are tied in to this one contract (the assumption agreement). Mr Warmuth said that a close supervision of ACE was needed.

Mr Rosen responded by saying that inspections of ACE are being done and we have requested monthly information to monitor claims. We have done this because we have a more direct interest in ACE's business than before.

*UK Proceedings*

Mr Alistair Gunn (representing Unionamerica) asked what, if all creditors can file in a UK proceeding, are the UK courts looking for in terms of UK creditors being "prejudiced" (As they will get nothing either way). Mr Hertz said the court could look at individual creditors and see if they are prejudiced in any way against the other jurisdiction.

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#### *Assets in UK*

Mr Williams asked what the assets to be remitted are. Mr Hughes said mainly the INA reinsurance asset. Mr Williams further asked if we could remit the "right to claim from INA". Mr Steinberg said yes and Mr Hertz added that operational concerns with regards to the physical collection of the UK assets might lead to the Provisional Liquidator being kept in place to collect UK assets and pass them through to the US.

#### **Proposed Way Forward**

Mr Hughes reiterated that the estate was looking for commercial solutions.

Mr Hughes listed the points raised in the meeting that the Provisional Liquidators would take responsibility for following up on. These points were as follows:

- Advice from Mr Leslie regarding how the US liquidation affects time bar for the UK creditors.
- Mr Leslie to provide a written opinion to the ICC regarding direct creditors ranking above reinsurance creditors in a New Hampshire Liquidation (point raised by GW)
- Clifford Chance to provide a comfort letter to creditors stating that any numerical information that they provide the Liquidation team with for the purposes of commercial discussions with ACE-INA will not be construed as a claim in the estate. (see below for discussion).
- To provide the ICC with the Clifford Chance advice on the limitations impacting the ability to force a portfolio transfer on ACE-INA (including the FSA's powers in relation to this matter).
- To provide the ICC with Counsel's advice regarding the applicability of the EU directive to this Liquidation and the ability to ring fence UK assets.
- To provide the ICC with the "Matrix"
- Ernst & Young to provide detailed breakdowns of fees incurred to date.

#### **Further Questions**

Mr Hughes opened the discussion to the floor for any further questions.

#### *ACE-INA*

Mr Rawlings asked about what discussions the Liquidator/Provisional Liquidators have had with AEC to date regarding a commercial solution. Mr Hughes outlined that ACE are not performing regarding the "Rutty pool", they are not paying the provisional liquidator cash they owe and they have been generally difficult. Often such a situation would mean litigation for a Liquidator but this estate is keen to find commercial solutions to problems such as these. Mr Hughes further informed the creditors his relationship with Mike Durkin at AEC has been good and discussions have led to ACE stating they are willing to continue the run-off of Rutty and are willing to pay across \$1m+. Mr Hughes also stated that the Provisional Liquidators have not received this cash to date.



Again Mr Hughes pointed out that the estate is looking for commercial solutions early but to do this the estate needs to better understand their obligations and in particular what their liabilities look like in the eyes of the cedants.

#### *Commercial Solutions*

Mr Bengelsdorf reiterated this point saying the current situation with ACE is trying to decide whose numbers are right (ACE or the cedants). His view is that there are reviews that there are 3 types of creditor in the UK:

- Those with Offset issues
- Those with contractual treaty issues
- And others

Mr Bengelsdorf wants information from the cedants about which of these categories they fall into, their unique circumstances and issues. He stated his willingness to discuss business solutions with any individual creditor. He said none of the people on the ICC had yet presented a claim and information (regarding claims and potential claims) is a key part of the game for the Liquidators trying to discuss commercial solutions.

#### *How to Incentivise Creditors*

Mr Williams summarised his understanding of the present situation:

- There is a lot of uncertainty (in particular regarding the eventual size of the estate).
- Reinsurers rank down the list and would probably get nothing from the estate (save offset)
- The ACE-INA reinsurance provides the largest asset in this estate and this asset depends on claims made by creditors. He questioned what incentive there was for reinsurers to put claims in to such an estate.

Mr Hertz emphasised that set-off would be a strong incentive for these people to present their claims.

Mr Goodlud re-emphasised that from the perspective of a reinsured party there would be a great deal of administrative effort and cost involved with getting a claim set up and agreed, for no real benefit. He said UK creditors would need a reward to secure recoveries for direct US creditors. Mr Hughes said the estate was aware of the issues raised and was working towards a solution. GHH again urged the creditors to provide the Liquidation team with the most detailed and accurate figures they can, as it is believed that ACE's figures are light.

#### *Comfort Letter*

Mr Warnuth asked whether they could have a comfort letter saying that any information provided by the ICC members as requested in the meeting would not be construed as a claim in the estate. Mr Leslie said the reason the Liquidator needs this information is purely commercial and that he would word a comfort letter that GHH could send out to creditors in due course.

**Close**

**Mr Hughes closed the meeting saying that the Liquidation team would provide all the information and documentation promised in due course.**

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