EXHIBIT A

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0109

In the Matter of the Liquidation of
The Home Insurance Company

AFFIDAVIT OF RICHARD DANIEL HACKER Q.C. IN OPPOSITION TO THE LIQUIDATOR'S MOTION FOR APPROVAL OF AGREEMENT AND COMPROMISE WITH AFIA CEDENTS

I, RICHARD DANIEL HACKER, one of Her Majesty's Counsel, of 3-4 South Square, Gray's Inn, London, England , hereby depose and say :-

1. I am a member of the English Bar admitted to practice law in England. I received an Honours Degree in Law from the University of Cambridge in 1976 and a License Speciale en Droit Europeen (with Distinction) from the University of Brussels in 1978. I was admitted to the English Bar in 1977 and have been continuously in practice as a Barrister since 1980. As a member of the Bar, I am qualified to advise and deliver opinions on matters of English law.

2. I specialise in business law with a heavy emphasis on insolvency matters and have been involved in many of the contentious insolvencies which have come before the English courts since I began to practice. A true and correct copy of my Summary Curriculum Vitae setting out my professional qualifications and experience in greater detail is attached as

Exhibit A. I have previously provided expert evidence of English law in relation to a number of matters proceeding before the United States Bankruptcy Court for the Southern District of New York.

3. In order that the Court is best able to judge the weight to be attached to the expert evidence which I give, I propose to explain briefly the structure of the English legal profession. In the interests of simplicity I deal here in generalisations to which there are, of course, exceptions. There are two types of practising lawyer in England. The Solicitor and the Barrister. The former deals directly with clients and will very often provide all the advice required by the client. Where more specialist advice is required (or advocacy skills are involved), the Solicitor will instruct a Barrister known to possess the necessary expertise. Until 2003, the Queen (on the advice of the Lord Chancellor) each year appointed a small number of practising lawyers to the rank of Queen's Counsel. Where a complex issue of law requires consideration and substantial sums are at stake it is normal for the advice of a Queen's Counsel to be sought. Only something over 1% of the practising legal profession currently hold the rank of Queen's Counsel. I was appointed a Queen's Counsel in 1998.

4. I have previously made an Affidavit in these proceedings on 12th March 2004, but for ease of reference, repeat in this Affidavit the substance of the evidence contained in that earlier Affidavit in order that my evidence can be found in a single document.

Materials which I have reviewed

5. I have reviewed and relied upon in preparing my Affidavit :-

   (a) the Motion for 'Approval of Agreement and Compromise with AFIA Cedents' filed by the Liquidator of the Home Insurance

Company (respectively "the Motion", "the Liquidator" and "Home");

(b) the Affidavit of Peter A Bengelsdorf sworn on 10th February 2004 in support of the Motion;

(c) an Insurance and Reinsurance Assumption Agreement dated 31st January 1984;

(d) an Order of the English High Court of Justice, Chancery Division, Companies Court ("the English court") dated 8th May 2003 appointing Joint Provisional Liquidators in respect of Home ("the English Order");

(e) the Objections and Response of the ACE Companies to the Liquidator's Motion, together the Memorandum in support thereof (and the attachments thereto) and a Supplemental Memorandum;

(f) the Liquidator's Reply dated April 2nd 2004and his Supplemental Reply served on 16th April 2004;

(g) the Affidavit of Gareth Hughes sworn on 31st March 2004 ("Hughes");

(h) the Affidavit of Rhydian Williams sworn on 1st April 2004;

(i) the Affidavit of Gernot Warmuth sworn on 31st March 2004;

(j) the Affidavit of Jonathan Rosen sworn on 26th March 2004 ("Rosen");

(k) the Affirmation of Robin Knowles QC dated 2nd April 2004 ("Knowles"); and

(l) a 'Note of Advice' prepared jointly by Robin Knowles Q.C. and Professor Ian Fletcher dated 19th October 2003.

6. I have been asked by Counsel for Century Indemnity Company and ACE Property & Casualty Insurance Company ("Century" and "ACE") to assume certain facts as set out in paragraph 26 below. The facts and information set out below are either within my own knowledge gained through my involvement with this matter, in which case they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information and belief.

The subject matter of my evidence

7. It is suggested in paragraph 7 of the Motion that certain AFIA Cedents have questioned the application of the New Hampshire claims and distribution procedures to claims and assets of Home alleged to be located in the United Kingdom *"thereby raising the potential for complex international conflicts of laws questions."* It is stated that :-

> *"In particular, certain AFIA Cedents have previously suggested that UK assets arguably should be 'walled off' from United States creditors and distributed only to Home UK Branch creditors."*

8. Paragraph 7 of the Motion goes on to state that neither the Liquidator nor the Joint Provisional Liquidators believe that there is any merit in that contention but that :-

> *"the potential re-emergence of this issue does raise the prospect of costly and time-consuming litigation over whether there should be separate US and UK liquidations or a global New Hampshire proceeding."*

This potential issue is further emphasised by the following statement :-

> *"Resolution of these and other issues could require complex, protracted and costly litigation in both the United States and England."*

9. I have been asked by Counsel for Century and ACE to comment on these statements in the Motion, viewed from the standpoint of English law.

10. A number of other issues to which English law appears to be relevant, have also arisen from the documents filed in the proceedings. In particular I note that :-

    (a) there are references to assertions which are alleged to have been made by Century and/or ACE to the effect that a 'cut-through' would be permissible under English law;

    (b) the Liquidator's Reply-states (on page 15) that to the extent that the Joint Provisional Liquidators transfer assets to the proposed Scheme Administrators, such transfers *"are administrative expenses of the UK proceeding ... "*

    I have been asked to comment on the position under English law in relation to these matters.

Summary of my opinion in relation to ring-fencing

11. The suggestion that an English court would 'wall-off' (or 'ring-fence' as the concept is described in England) English assets to be divisible in a separate English liquidation only amongst the English creditors of Home, is misconceived. This much appears to be common ground between myself and the Liquidator and Joint Provisional Liquidators.

12. I note that in his expert Opinion given on behalf of the Liquidator in these proceedings, Mr Knowles Q.C., does not suggest otherwise. Neither does he suggest that there is any uncertainty in relation to the substantive legal position, nor seek to cast any doubt upon my analysis of that position under English law. The position is amply confirmed by the 'Note of Advice' which records the advice given by Mr Knowles

Q.C. and Professor Fletcher[1] some months prior to the filing of the Liquidator's Motion. Their conclusion states the position with admirable clarity :-

> *"15. We therefore conclude that English law will not allow for the UK Branch assets to be ring-fenced for the benefit of UK branch creditors, at the expense of according equality of treatment to the non-UK creditors in the course of the administration of the worldwide estate of the Home"*

13. I would go significantly further and say that the suggestion is so fundamentally misconceived as to merit summary dismissal by the English court.

14. If any AFIA Cedent were to suggest to the English court that local assets should be ring-fenced to meet their claims, I do not believe that the court would pay any serious regard to the suggestion. Indeed, I believe that the court would summarily dismiss the suggestion without requiring any significant debate or argument.

15. I do not believe that it can seriously be suggested that the dismissal of such a proposal would, or indeed could, involve litigation in England which is '*complex*', '*time-consuming*', '*protracted*' or '*costly*', as suggested in the Motion.

Issues considered

16. It appears to me that a consideration of the concerns expressed by the Liquidators logically involves considering three discrete issues under English law :-

(a) Will Home be 'wound up' (liquidated) in England ?

(b) If so, will ring-fencing occur ?

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[1] The author of the leading work, "Insolvency in Private International Law"

(c) How will the English court deal procedurally with any attempt by AFIA Cedents to procure ring-fencing of Home's UK assets ?

Provisional liquidation and liquidation distinguished

17. Home is in liquidation in the United States, but it is not presently in liquidation in England. Although Home is in 'provisional liquidation' in England pursuant to the English Order, this is something very different from a liquidation.

18. A liquidation - whether voluntary or compulsory (pursuant to an order of the Court) – involves the assets of the insolvent debtor being taken out of its control and subjected to a 'statutory scheme', administered by a liquidator, under which the assets are to be realised and then to be shared out amongst the creditors of the debtor in accordance with an established set of rules, which provide for *pari passu* distribution amongst each class of creditor, subject to the priority status of the class. There are provisions in the Insolvency Act 1986 which not only regulate the manner of distribution but also provide for the avoidance of certain antecedent transactions and the application of mandatory rules such as those regulating rights of set-off.

19. A provisional liquidation is a quite different animal. It is, in one sense, a misnomer because it has none (or at most very few) of the characteristics of a liquidation. The traditional purpose of a provisional liquidation is to protect and preserve the assets of a company in what is generally the relatively short interval between the initiation of proceedings seeking the winding-up of a company (by the presentation and issue of a winding-up petition) and the decision of the Court whether to make a winding-up order or to dismiss the petition. The appointment was traditionally seen very much as a 'stop gap' measure and the office was traditionally filled by an Official Receiver, a public official attached to the Court who had neither the resources nor the skill to take anything

more than the most basic steps to perform the very limited functions usually conferred upon him. The 'stop gap' nature of the appointment is reflected in the terms of the conventional order appointing provisional liquidators, which generally contains few specific powers.

20. The role of provisional liquidation has, more recently, undergone some change (as discussed in paragraph 23 below in the section dealing with schemes of arrangement) but the interim nature of the process remains unaltered. One essential characteristic of provisional liquidation is that once in place, there is an automatic stay of all proceedings against the insolvent debtor. The moratorium is absolute, subject to the power of the provisional liquidators and the court to lift it in relation to specific claims. In its more recent form, provisional liquidation is often used only for the purpose of achieving the protection conferred by the statutory automatic stay, which comes into effect on the appointment of provisional liquidators, in circumstances where there is no intention for a liquidation to follow: see further paragraph 23 below.

Schemes of arrangement

21. The scheme of arrangement ("scheme") is a creation of statute and (in broad terms) enables a debtor – solvent or insolvent – to enter into an arrangement with his creditors as a whole or with one or more classes of creditor, under which the debtor and the relevant creditors agree an arrangement or compromise relating to the claims existing between them. The scheme will invariably include a provision that bars a creditor from enforcing a claim covered by the scheme, other than through the scheme process.

22. The difference between a scheme and a simple contractual arrangement is that a non-assenting creditor may be 'crammed down' (i.e. bound by the terms of the scheme against his wishes) under a scheme if a specified majority of the class of which the creditor is a member, have approved the

scheme. The relevant majority is a simple majority in number[2] representing not less than 75% in value of those voting on the scheme proposal. There are various procedural safeguards which ensure that all relevant creditors are given the opportunity to vote on the scheme proposal and require also that the court be satisfied that the scheme is fair and reasonable to the class(es) of creditors bound by it.

23. The scheme process has a fundamental weakness. The process of formulating and obtaining creditor and court approval for the scheme is inevitably a slow one, but the statute does not provide for any form of moratorium on the enforcement of creditor claims during the process. To counter this significant lacuna, provisional liquidation has developed to provide for an extended moratorium in respect of claims against an insolvent debtor, whilst an alternative to liquidation – the scheme – is put in place. I would refer, as an example, to the unreported judgment of Harman J. in *Re Andrew Weir Insurance Company Limited* (12th November 1992).

24. However, it is important to note that even in this extended form (the form provided for under the English Order), a provisional liquidation does not involve anything akin to a liquidation. In particular, none of the provisions relating to the avoidance of antecedent transactions have any application and, most fundamentally, there is no process of distribution of assets amongst the creditors of the insolvent. Perhaps most importantly, it is never intended that the exit route from this form of provisional liquidation should be a full liquidation. Once a scheme is in place and the moratorium has served its purpose, the winding-up petition will generally be dismissed and the provisional liquidation discharged as it will no longer serve any useful purpose. (In any given

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2 My earlier Affidavit contained a typographical error as the reference in paragraph 18 line 5, to a simple majority in 'value' should have been to a simple majority in 'number'.

case there may be some good reason why a liquidation is desirable in parallel with a scheme, but this would be the exception rather than the rule.)

25. From this it follows that the existing provisional liquidation of Home will not, in the ordinary course, lead to an English liquidation of Home. I consider below the question whether the creditors of Home would be able obtain a winding-up order in opposition to the wishes of the Liquidator and/or Joint Provisional Liquidators.

26. I am unclear how the Joint Provisional Liquidators propose to address the creditor issues[3] which would or could arise in relation to the proposed scheme mentioned in paragraph 10 of the Motion. The Joint Provisional Liquidators appear to be proceeding on the basis that the scheme would apply only to the AFIA Cedents. I am informed that there are creditors whose claims rank *pari passu* with those of the AFIA Cedents in a liquidation of Home (whether an English or a New Hampshire liquidation) and who would therefore fall to be treated in Home's liquidation as members of the same class as the AFIA Cedents. The scheme would therefore appear to constitute a blatant infringement of the *pari passu* principle and I question whether, for this reason, the English court would sanction such a scheme. In this regard, I would refer (by way of an illustration of the sort of difficulties which the scheme might encounter) to the judgment of Rattee J. in *Re Business City Express Limited* [1997] 2 BCLC 510. In that judgment, Rattee J. questioned whether an English court would lend its assistance to attempts to discriminate, by the use of a scheme, between those having the same ranking as creditors, where the assets to be distributed in the scheme are the company's own assets.

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3 In my first Affidavit, I referred to 'creditor class' issues. This should have been a reference to creditor issues generally.

27. In this respect I agree with Mr Knowles Q.C. who, (at Knowles paragraph 6) deposes that whilst a scheme can allow flexibility that would not be possible in a liquidation, the English court can be expected to examine closely a scheme that proposes to depart from the *pari passu* principle.

The winding up in England of foreign companies

28. The power of the English court to wind up companies derives from statute. The statute permits the court to wind up insolvent companies wherever incorporated, and imposes no specific limitations on that power. The power to make a winding-up order is a discretionary power which will be exercised by the court in accordance with settled principles. In general, a creditor of an insolvent English incorporated company is entitled to a winding up as a matter of right, and there is rarely any question of discretion, unless the winding-up is opposed by other creditors of the company.

29. However, this is not the case with a foreign incorporated company. The English court has adopted a self-imposed restraint on the circumstances in which the discretion will be exercised in favour of winding up a foreign company. Broadly speaking, the power will not usually be exercised unless there are assets within the jurisdiction of the English court.

30. Even where the court has a discretion to wind up a foreign company in accordance with the principles outlined above, this does not mean that the discretion will automatically be exercised in favour of a winding-up. The court will review all the circumstances in any particular case, with a view to identifying whether or not a winding-up would be in the interests of the general body of creditors of the company.

31. It is often the case that an insolvent foreign company will be the subject of a winding-up in its home jurisdiction (as in the present case). In those circumstances the English court would certainly have regard and could be expected to attach significant weight to the views expressed by the 'home' liquidator as to what course it should follow. Whilst there may be circumstances in which the English court would wind-up a foreign incorporated company in the face of opposition from its 'home' liquidator, the court would require compelling reasons to do so.

32. I can see no reason why the English court would make a winding-up order on the application of the AFIA Cedents, in the face of opposition from Home's New Hampshire Liquidator, save only if it was required to do so in order to give effect to the principle considered in paragraph 45 below.

33. It is hard to see how the question of ring-fencing could arise at all, other than in the context of an English liquidation of Home. If there is no winding-up the question simply does not arise at all.

Ring-fencing in English law

34. Ring-fencing of local assets does not now form, nor has it ever formed, part of English law. Indeed it is a concept fundamentally repugnant to two basic English principles: namely, the principle of universality and the principle that it is the 'home' forum which has primary responsibility for the administration of the insolvency of a foreign incorporated or domiciled debtor.

35. There are a number of reported decisions of senior and highly experienced judges in which the concept of ring-fencing has been roundly and unequivocally rejected. It is, however, convenient simply to note (as appears from the decisions mentioned below) that under English law an English winding-up of any company (English or foreign) is

treated as being notionally a universal liquidation of all its assets for the benefit of all its creditors (the universality principle), but that where a foreign company is being wound up in its place of incorporation, the 'home' liquidation is to be regarded as the principal liquidation with an English liquidation being only ancillary thereto (the concept of the ancillary liquidation, as to which see e.g. *Re Bank of Credit and Commerce International SA (No. 10)* (supra) at pages 238F-G et seq.).

36. The suggestion in paragraph 7 of the Motion that claims and assets allegedly "*located in the United Kingdom*" would be treated differently from those located outside the United Kingdom in an English liquidation of Home presupposes that there are assets and claims identifiable as such. The Motion does not address the question of what rules the AFIA Cedents would seek to persuade an English court to adopt in determining which assets or claims are 'local' and which are not. It is because of the potential scope for confusion and conflict with the rules and principles applied by overseas courts that the English courts will not embark upon such an analysis and will apply the universality principle. The only very limited exception to this (the application of the mandatory rules of English insolvency law to the distribution of assets coming into the hands of an English liquidator) is mentioned in paragraph 45 below.

37. The application of the universality principle means also that the proposed scheme may not achieve its avowed objective: the avoidance of one section of a class of creditors (the AFIA Cedents) using litigation in the English courts to improve their position as against another section of the same class. Assuming that the AFIA Cedents are in a position to procure a liquidation of Home, there is nothing to stop disaffected non-AFIA cedents (the other section of the same class) who objected to the preferred status being accorded to the AFIA Cedents, also seeking an English liquidation of Home, as they would not be covered by the proposed scheme (which benefits only the AFIA section of the cedent

class). There would then be scope for precisely the complex international conflict of laws questions which it is said that the scheme is intended to avoid. I note that the potential issues to which the universality principle gives rise are not addressed in the Motion.

38. As noted above, the concept of ring-fencing has been rejected by the English courts. That rejection has been summary, and none of the judges who have expressed a view in relation to it have even accepted the possibility that the contrary might be arguable.

39. It is convenient to begin with a judgment of Sir Nicolas Browne-Wilkinson V.-C. (as he then was) given in the context of the hearing of the petition by the Bank of England to wind up the Bank of Credit and Commerce International SA (a Luxembourg incorporated company hereafter referred to as "BCCI"). When the judgment was given, Sir Nicolas Browne-Wilkinson V.-C. was a Judge of the Court of Appeal, but sitting also as the Vice-Chancellor (the most senior judge of the Chancery Division and therefore of the Companies Court: see paragraph 52 below). He was subsequently appointed to sit as a Lord of Appeal in Ordinary in the House of Lords (the most senior English appellate court, corresponding in the United Kingdom to the United States Supreme Court), and it is hard to imagine a more authoritative view of the position under English law from a judge sitting at first instance. He stated in a judgment given on 30th July 1991 :-

> *"I have no hesitation in rejecting the Bank of England's grounds for opposing an adjournment. This case raises, and will continue to raise, enormous problems. BCCI is a Luxembourg bank; it is not an English bank. As I understand it, if a winding up goes forward the assets of BCCI worldwide will be applicable for the creditors of BCCI worldwide. The attempt to put a ring fence around either the assets or the creditors to be found in any one jurisdiction is, at least under English law as I understand it, not correct, and destined to failure. I believe the position will prove*

to be the same in most other countries and jurisdictions."

40. The issue arose again in the context of a subsequent hearing in relation to BCCI reported at [1992] BCLC 579. Sir Nicolas Browne-Wilkinson V.-C. stated in his judgment :-

> *"Thirdly, there are proceedings in the United States brought by the provisional liquidators in this country, by the commissaire in Luxembourg and the court-appointed officers in the Cayman Islands designed to freeze the assets in the United States. Interim relief has been granted providing to a substantial extent the freezing order required, but there are further inter partes proceedings pending. If it is suggested in those proceedings (as I am told that it is suggested) that this court is in some way concerned to look after the interests of the English depositors or those whose claim is against BCCI in England at the expense of creditors elsewhere, the message that would go out would be extremely dangerous and totally erroneous. I have asked all counsel before me today, including those representing the three batches of creditors, whether they were maintaining that there could be any sort of ring fence rendering assets in any one jurisdiction applicable for the benefit of the creditors in that jurisdiction only. They have all disowned that proposition. There is therefore unanimity amongst the bar, unanimity with which I totally concur, that any administration in any jurisdiction under English law would be a worldwide administration for the administration of all assets wherever to be found for the benefit of all creditors wherever to be found."*

41. Statements to similar effect can be found in other decisions. See the decision of the Court of Appeal in *Re Paramount Airways Limited* [1993] Ch 223, in which the then Vice-Chancellor (Sir Donald Nicholls V.-C., sitting on this occasion as a judge of the Court of Appeal and since also appointed to sit in the House of Lords as a Lord of Appeal) stated at page 237:-

> *"Particularly, perhaps, since English law provides for the distribution of the assets of the insolvent among all the creditors worldwide. English law does not erect a 'ring fence' to exclude creditors living abroad."*

42. I would refer also the decision in *Re Bank of Credit and Commerce International SA (No. 10)* (supra) in which the then Vice-Chancellor, Sir Richard Scott V.-C. (also subsequently appointed to sit as a Lord of Appeal in the House of Lords) stated at pages 241G-H – 242C-D :-

> *"This exposition seems to me to provide a valuable insight into what was meant by an "ancillary" winding up. The effective jurisdiction of the court is, for winding up purposes, necessarily territorial. English liquidators can get in assets of the company that are within the jurisdiction of the court. But they can only get in assets of the company that are outside the territorial jurisdiction of the court if or to the extent that their title to control the company is recognised by the courts of the country in which the assets are situated. The English statutory insolvency scheme purports to have worldwide, not merely territorial, effect. Every creditor of the company, wherever he may be resident and whatever may be the proper law of his debt, can prove in an English liquidation. The liquidators must get in and realise the company's assets as best they may whatever may be the country in which the assets are situated. But, if the company is incorporated abroad, English liquidators' ability to get in and realise the company's foreign assets will be very limited. It follows that, if a foreign company has a winding up order made against it in its country of incorporation and a winding up order made against it in England, the English liquidators' role is likely, perforce, to be limited to getting in, realising and distributing the English assets. It was in that sense, I think, that Kay J. was describing the English liquidation as "merely . . . ancillary." I would add, however, that Kay J.'s remark that the only purpose of the "ancillary" winding up would be "to protect the property in this country and the creditors in this country" cannot, without qualification, be accepted as correct. <u>It is basic to an English winding up that English creditors cannot be ring-fenced and treated</u>*

> *more favourably than foreign creditors. The reference to "creditors in this country" must, therefore, be read as a reference to "creditors who prove in this country."* (Emphasis added)

43. Having regard to the clarity and force with which no less than three successive Vice-Chancellors (all of whom were subsequently appointed Lords of Appeal and sat as such in the House of Lords) have rejected the possibility that the English court could or would ring-fence local assets for those proving in a local liquidation, I cannot see how the contrary proposition could be suggested to be capable of argument at all, let alone serious argument. I note that Mr Knowles Q.C. does not dissent from this conclusion (which was expressed in the same terms in my earlier Affidavit).

44. In my opinion the alleged threat made by the AFIA Çedents to argue in favour of ring-fencing is a hollow threat and must be known both by them and by the Liquidator and Joint Provisional Liquidators to be a hollow one. Any attempt by the AFIA Cedents to achieve a ring-fence would not only face an inevitable defeat before the English court, but would equally inevitably result in an adverse costs order against them; resulting in a liability on their part to meet the costs incurred by the Joint Provisional Liquidators, and the Liquidator, in resisting the attempt (see further paragraph 54 below in relation to the applicable costs regime).

45. I should, for the sake of completeness, add that in his judgment in *Re Bank of Credit and Commerce International SA (No. 10)*, Sir Richard Scott V.-C. did recognise that creditors proving in an English liquidation of an overseas company are entitled to have the mandatory rules of English insolvency law (most notably those relating to preferential claims and rights of set-off) applied to their claims, and that for this purpose the English liquidators of a foreign company might retain those assets coming into their hands to ensure the application of those rules.

This is a highly specific and very limited exception to the general rule that English assets should be remitted by an English liquidator to the liquidator in the 'home' jurisdiction for him to distribute those assets in the 'home' liquidation.

46. The Liquidator, in his Supplemental Reply, seeks in Section II C., wrongly, to characterise the statement made in paragraph 45 above[4], as a 'concession' on my part that *"English creditors could conceivably convince an English court to ring fence"*. The statement was not intended to be, nor in my opinion can it reasonably be construed as, such a concession. It is no more than a recognition that the English court will give a very limited and highly specific degree of protection to those creditors who choose to prove in an English liquidation. In substance, what the court will do is to give an English liquidator the authority to repatriate English situated assets to the principal ' home' liquidation, on terms that those proving in the English liquidation are not disadvantaged by being deprived of such rights as English law confers on them, over and above those given by the 'home' liquidation.

47. The fundamental error underlying the Liquidator's analysis of the position (including the potential consequences of the application of the approach described in paragraph 45 above) and of the potency of any threats which may have been made by the AFIA Cedants, is to assume – wrongly – that it is only 'English' creditors who are entitled to prove in an English ancillary liquidation. Thus, in Section II B of his Supplemental Reply, the Liquidator states that :-

> *"They also indicated that they would attempt to keep assets in England for distribution to creditors there in the hope that because of the relatively small number of ostensibly affected creditors they might stand a chance at a dividend on their claims out of an English proceeding."*

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4 Which appeared as paragraph 40 of my earlier Affidavit.

This ignores the universality principle which, as a matter of English law, would entitle all of Home's creditors to come in and prove in an English liquidation: see per Sir Richard Scott V.C. in *Re Bank of Credit and Commerce International SA (No. 10)* (supra) at pages 241H - 242A, where he stated :-

> *"The English statutory insolvency scheme purports to have worldwide, not merely territorial effect. Every creditor of the company, wherever he may be resident and whatever may be the proper law of his debt, can prove in an English liquidation."*

My conclusion is fully consistent with the advice which the Provisional Liquidators / Liquidator have received. The 'Note of Advice' signed by Mr Knowles Q.C. and Professor Fletcher, states in the clearest terms in paragraph 12 :-

> *"12. We conclude that in an English winding up of the Home the proceedings would assume the usual, universal character and that the worldwide insurance creditors of the home would be entitled to prove and rank alongside UK Branch creditors."*

48. The laws of New York (as the governing law of the INA Agreement) and/or the laws of New Hampshire (as the law governing Home's domiciliary liquidation) would determine whether the only specific asset referred to in the Motion (Home's claims under the INA Agreement) would be an asset which would or could come into the hands of an English liquidator of Home. I can see no basis why, as a matter of English law, an English liquidator should have a claim to that asset which would override the claim of the Liquidator.

49. Since my earlier Affidavit was sworn, the Liquidator has sought to identify a further 'English' asset of Home: sums payable to Home under re-insurance treaties ("the BAFCO treaties") originally written by BAFCO Reinsurance Company of Bermuda Limited (a Bermudian re-

insurer) in respect of which there has been a subsequent transfer of liability to Century International Reinsurance Company Limited ("CIRC"), another Bermudian re-insurer. Various suggestions are made as to why these sums would fall to be treated as an 'English' asset. It is said that the reinsurances were entered into in England[5] and that the treaties are governed by English law, that they provide for arbitration in London and that the proceeds of claims made under the treaties have over a period of many years been used by Home to pay its English creditors[6].

50. As a matter of English law, none of these suggested connecting factors has any relevance to a determination of the *situs* of a debt. The relevant principles of English law are clearly set out in *Dicey & Morris on the Conflict of Laws (13th ed)* at paragraphs 22-026 to 22-030. The determining factor is the place of residence of the debtor at the time when the question arises; as it is in that place that payment of the debt can be enforced. It is to be noted that whilst a debt can only be situate where it can be enforced, the mere fact that payment from the debtor can be enforced in a place that is not his residence, does not make it situate there. I am informed that CIRC's sole[7] place of business is that of its place of incorporation, Bermuda. On that basis, any debt due from CIRC in respect of the BAFCO Treaties is (as a matter of English law) situate there.

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5 Rosen paragraph 9

6 Hughes at paragraphs 7 – 11

7 I mention, only for the sake of completeness, that a corporation is treated as being resident in any place in which it carries on business (see *Kwok v. Estate Duty Commissioner* [1988] 1 W.L.R. 1035) and where a corporation has two places of residence, the *situs* of a debt which it owes will be the place where the debt is, on the true construction of the underlying contract payable, or where the contract does not enable such identification, where the debt would be payable in the ordinary course of the debtor's business: see *Re New York Life Assurance Co. v. Public Trustee* [1924] 2 Ch 101 (Court of Appeal) and the cases cited therein.

Procedural considerations

51. There are a number of considerations specific to the procedural regime, which applies in England, which I believe to be relevant when considering the suggestion that litigation of the ring-fencing issue in England would be protracted or costly.

52. Insolvency proceedings of a contentious and substantial nature are handled exclusively by the judges of the Companies Court.[8] The Companies Court is a branch of the English High Court (the principal English court of first instance) and is composed of a small number of judges, all of whom are highly expert and experienced in insolvency issues generally and in the relevant legal issues which would require consideration in the context of any dispute between the Liquidator / Joint Provisional Liquidators and the AFIA Cedents. Their expertise is (in my experience) comparable with that of the judges of the United States federal bankruptcy courts.

53. Any litigation which took place would be regulated by the Insolvency Rules 1986, which are intended to enable such a dispute to be determined as speedily and efficiently as its complexity permits. If there were a dispute between the Liquidator and the AFIA Cedents as to whether assets should be ring-fenced, the dispute would be decided by a Companies Court judge on the basis of written evidence (almost certainly without oral evidence or cross-examination) and without any form of pre-trial discovery (oral or documentary). Any decision of the judge would be final

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8 Non-contentious or procedural matters are often dealt with by a small panel of highly specialist registrars, whose decision can generally be challenged before a judge.

unless either he or the Court of Appeal gave permission for an appeal to the Court of Appeal. I believe that the ring-fencing issue is so clear-cut that permission would not be given.

54. In England, a significant proportion of the legal and other professional costs incurred by the Liquidator / Joint Provisional Liquidators in resisting any attempt by the AFIA Cedents to ring-fence local assets would be recoverable by them when they succeeded in resisting the attempt (as in my opinion they would). The costs burden on the Home estate of resisting any attempt to ring- fence would, therefore, be small.

55. Mr Knowles Q.C. (Knowles paragraphs 10-12) differs to some extent from the views, which I expressed in my earlier Affidavit (and have repeated above) as to the likelihood of a speedy resolution of the 'ring-fencing' issue if it were to be raised before an English court. He concedes the possibility that the court would summarily dismiss any attempt to ring-fence, but expresses the view that this is not a certainty. I disagree with him.

56. Mr Knowles Q.C. identifies thee considerations, which he suggests put this in question. First, he suggests that because the sums in issue are large, preparation will tend to be full. Secondly, that there is scope for factual complexity. Thirdly, that there might be an attempt to appeal a first-instance decision. The first and second points appear to me to be interdependent. If there is no factual dispute there is nothing to prepare, other than legal argument on a very short point on which the authorities are all one way. However, I can see no scope for a factual dispute in relation to the ring-fencing issue and Mr Knowles Q.C. has not sought to identify

even a single factual issue, which might require resolution. This disposes of his first and second points.

57. I have already addressed his third point. I have indicated (and had previously indicated in my earlier Affidavit to which Mr Knowles Q.C. was responding) that permission for an appeal would be required and would inevitably be refused. Mr Knowles Q.C. does not disagree with this prognosis of the outcome of any application for permission to appeal. The application for permission would initially be made to the first-instance judge at the time when judgment was given. It would probably last 5 minutes (at most) and would involve no additional cost. It would certainly be refused. The prospective appellant would then, within 14 days, have the right to lodge a paper application with the Court of Appeal which, if it were minded to dismiss the application for permission, would deal with the application on paper without calling on the Liquidator to reply. If dissatisfied with the decision on the paper application, the prospective appellant could, within 7 days, seek an oral hearing before the Court of Appeal, which the Liquidator would not normally be required or permitted to attend. I would expect the Court, at that hearing, to confirm its earlier paper decision refusing permission. It can be seen from this very brief description of the appeal process that if a proposed appeal clearly has no merit, there is little scope for delay and the Liquidator will not be put to any additional expense.

The 'cut-through' issue

58. It is suggested in the Liquidator's Motion that Century and/or ACE might seek to obviate payments to Home by negotiating a 'cut-through' directly with the AFIA cedants. Mr Knowles Q.C. expresses the view that *'proceedings concerning attempts to cut-through'* could be expected to involve complex factual and legal issues. Although he neither identifies the proceedings which he has in mind nor the issues to which they might give rise, as he is opining from the standpoint of an English lawyer I must assume that he is referring to proceedings (wherever brought) in which the legal issues would be English law issues, and I confine my comments to such issues.

59. I do not dissent from the view, which Mr Knowles Q.C. expresses. Any re-insurer who sought to implement a 'cut-through' would undoubtedly face serious opposition from the Liquidator and/or Joint Provisional Liquidators. A previous insurance insolvency in which such a course was adopted (that of the National Employers' Mutual General Insurance Association Limited) resulted in a lengthy, extremely time consuming and very costly trial which did not, in the result, clarify a large number of the legal issues which it raised as it was compromised in its 6th week (at an early stage in the trial).

60. The complexities are potentially even greater where the 'home' liquidation (here, the main case in New Hampshire) is taking place under a system of law which imposes a blanket prohibition on cut-throughs in an insolvency context. In any proceedings before the

English court, the Liquidator could reasonably expect the English court to have regard to the fact that cut-throughs will (as I am informed) be impermissible in the main New Hampshire proceeding.

61. These are considerations to which any re-insurer proposing a cut-through would have to pay very careful regard.

Expenses

62. The Liquidator's Reply states (on page 15) that to the extent that the Joint Provisional Liquidators transfer assets to the proposed Scheme Administrators, such transfers "*are administrative expenses of the UK proceeding* ... ". I am not clear as to the foundation of this statement, as I note that it does not derive from anything said in Knowles. I disagree with the statement, as the concept of 'administrative expenses' has no relevance or application to provisional liquidations.

Signed under the penalties of perjury this 27th day of May 2005.

Executed at London, England
on 27th May 2005

Richard Daniel Hacker Q.C.

Subscribed and sworn to me before me this 27th day of May 2005 at London, England

Notary Public
NOTARY PUBLIC
LONDON, ENGLAND
N. P. READY
(My Commission expires with Life)