Case No: 2001/739

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 September 2003

Before:

THE HONOURABLE MR JUSTICE ANDREW SMITH

Between:

D. P. Mann and ors	**Claimants**
- and -	
Coutts & Co.	**Defendants**

Julian Flaux Q.C and Timothy Kenefick
(instructed by Barlow Lyde & Gilbert, Sols.) for the Claimants

Ali Malek Q.C. and Adrian Beltrami
(instructed by Herbert Smith Sols.) for the Defendants

Hearing dates : April 30, May 6, 7, 8, 12, 13, 14, 15, 21, 22, June 4 2003.

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

The Hon. Mr Justice Andrew Smith

Mr Justice Andrew Smith:

1. The claimants are members of Lloyd's who gave binding authorities to Hilton Malcolm Underwriting Limited ("HMU") to underwrite insurance on their behalf. They say that under the terms of the authorities HMU were to open and operate a separate account for funds relating to the underwriting, and that they understood that HMU, having opened a so-called client account at Coutts & Co ("Coutts") were fulfilling their obligations to do so; and they claim that HMU did not in fact do so. Coutts wrote a letter in August 1995 ("the undated letter") about HMU's account with them, and the claimants say that, but for the undated letter, they would have terminated HMU's underwriting authority and avoided losses. They claim that the undated letter was misleading, and that Coutts were negligent and in breach of a duty of care that they owed the claimants, both in writing it in the first place, and in failing later to give them proper information about an arrangement made between HMU and Coutts in about February 1996 for managing HMU's accounts that has been referred to as a "sweeper" arrangement. In this judgment I shall refer to the complaint about the undated letter as the "August 1995" complaint, and the complaint about the failure to give information as the "February 1996" complaint.

The Claimants

2. The twelve claimants subscribed either to a binding authority for a period from 21 November 1994 ("the first binding authority"), or to one for a period, initially a year, from 1 January 1996 ("the second binding authority"), or to both. Nine Lloyd's syndicates subscribed to the first authority in the following shares:

Syndicate 362 (Harvey Bowring)	19.76
Syndicate 376 (Venton)	19.77
Syndicate 435 (DP Mann)	19.76
Syndicate 138 (Bailey)	19.76
Syndicate 727 (Meacock)	4.74
Syndicate 314 (CF Palmer)	3.96
Syndicate 55 (G Lloyd-Roberts)	3.16
Syndicate 1028 (HR Dumas)	5.93
Syndicate 227 (St Paul Syndicate Management)	3.16

All of them except Syndicate 1028 also subscribed to the second binding authority, together with two new syndicates of Names. St Paul Syndicate management wrote the second binding authority on a stamp split between Syndicates 227 and 2227, the latter being a corporate member at Lloyd's. The underwriters on the second binding authority were these:

Syndicate 362 (Harvey Bowring)	18.25

Syndicate 376 (Venton)	18.52
Syndicate 435 (DP Mann)	18.52
Syndicate 138 (Bailey)	18.52
Syndicate 727 (Meacock)	4.45
Syndicate 314 (CF Palmer)	3.70
Syndicate 55 (G Lloyd-Roberts)	2.96
Syndicate 623 (AF Beasley)	7.41
Syndicate 991 (AE Grant)	4.44
Syndicate 227/2227 (St Paul Syndicate Management)	2.97

3. The syndicates of Names bring the proceedings through a representative member of each of them. In the case of eight syndicates the same representative claimant brings a claim relating to both the first and the second binding authorities, although there will inevitably have been some change in the membership of the syndicates at the relevant times.

4. The leading underwriter on both binding authorities was the Harvey Bowring Syndicate, no 362, one of the largest Lloyd's syndicates. The managing agents for Harvey Bowring were Murray Lawrence & Partners Limited ("Murray Lawrence"), syndicate no 362 being one of six syndicates managed by them. In the mid-1990's Harvey Bowring subscribed to a large number of binding authorities. The HMU binding authority represented only a small part of the business of Harvey Bowring, whose stamp at this time was of the order of £180 million.

5. Until 1996, when he became the Chairman of Murray Lawrence, Harvey Bowring's active underwriter was Mr Richard Keeling. He was succeeded by Mr David Shipley. Mr Keeling and Mr Shipley were not involved in the day-to-day operation of the HMU binding authorities. This was the responsibility of Mr John Andrews, a leading class underwriter for the Syndicate. Mr Christopher Ventiroso, a director of Murray Lawrence, was the claims manager of Harvey Bowring at the relevant time.

6. The second syndicate to subscribe to the two binding authorities was the Venton Syndicate, no 376.

7. Another syndicate that subscribed to both authorities was the D P Mann Syndicate, no 435. Mr George Doughty became their political risk and trade credit underwriter on 1 December 1994. The syndicate had already subscribed to the first binding authority, but from the date of his appointment Mr Doughty was responsible for all underwriting decisions taken in respect of the binding authorities.

The Binding Authorities

8. The binding authorities were broked to the claimants by Carpenter Bowring. The claimants participating in the first binding authority subscribed to it in November 1994, and Carpenter Bowring issued a cover note authorising HMU to write business on the syndicates' behalf on 25 November 1994. A Binding Authority Agreement was issued by Lloyd's Policy Signing Office ("LPSO") on 6 December 1994. HMU were authorised to write specified trade credit guarantee insurance up to a limit of £1.5 million for periods of up to 12 months "plus odd time not exceeding 18 months in all". The territorial limits for insurance risks bound under the first binding authority were the United Kingdom, the European Economic Union and Switzerland.

9. The gross written premium income limit for the underwriting under the authority was £15 million "or to be agreed by underwriters", and the gross written premium income estimate was £12.5 million. The agreement provided for quarterly bordereaux accounting for premiums received, paid claims and outstanding claims, and payment was to be made within 60 days of the end of each bordereaux period. There was a "cash loss: £100,000" provision: that is to say, if a claim exceeding £100,000 was to be paid, HMU could call upon the underwriters to pay it outside the quarterly accounting arrangements.

10. The commission to which HMU were entitled was between a minimum of 26.5% and a maximum of 35% according to the relationship between losses incurred and premium received. The commission was to be paid provisionally at 30% and adjusted according to the position at 31 December 1996 and annually thereafter.

11. The first binding authority was effective from 21 November 1994 to 31 December 1995, but both the underwriters and HMU might cancel it by 30 days' notice in writing. The slip had provided that "Cancellation by Underwriters may only be issued by the Leading Underwriter for underwriting reasons". Although this provision was not included in the agreement issued by LPSO, the slip and the agreement are to be read together, and I consider that Harvey Bowring were authorised to end the binding authority for all subscribers for underwriting reasons.

12. Clause 30 of the agreement, a printed clause, provided under the heading "Separate Bank Accounts" as follows:

> "The coverholder shall maintain a separate bank account which shall be used exclusively for the banking of all monies received from all sources which relate to insurance transactions of any kind".

Clause 22k, a typed clause which had been set out on the slip as a condition and was incorporated into the agreement under the heading "Procedure for Processing and Negotiation of Claims", read as follows:

> "The Coverholder shall maintain a separate fiduciary account in respect of all business hereunder. Such account shall be

operated in the manner of an I.B.A. Account as used by a registered Insurance Broker."

13. The slip for the second binding authority was subscribed in December 1995 and January 1996. It was for the period from 1 January 1996 to 31 December 1996. Apparently no agreed wording was issued by LPSO for the second binding authority. Mr Andrews' evidence was that he suspected that an endorsement was issued that the wording was the same as that for the first binding authority, but there is no such endorsement in evidence. The slip included a provision in the same terms as clause 22k of the first binding authority.

14. The second binding authority did not simply renew the first binding authority. It gave HMU increased authority in that:

i) The sum that might be insured under any one policy was increased to £3 million.

ii) The territorial limits were removed, provided that "In no event is more than 25% of the policy limit or £500,000 whichever is the lesser, to be in respect of credit risks in other than the United Kingdom, European Economic Union and Switzerland".

iii) The gross premium limit was increased to £20 million, and the gross premium income estimate to £15 million.

15. The second binding authority was extended to 31 January 1997 by an endorsement to the slip subscribed in December 1996 and January 1997. By later endorsements it was further extended first to 31 March 1997, then to 30 June 1997, and finally, by an endorsement scratched by Harvey Bowring on 25 June 1997, to 1 August 1997.

16. By a letter dated 11 July 1997 and sent on behalf of all the underwriters, Harvey Bowring wrote to HMU alleging that they were guilty of "serious and fundamental breaches of your obligations under the binding authority", and giving notice that it was terminated with immediate effect.

HMU

17. HMU were a company incorporated on 29 July 1994 by Mr Clive Hilton and Mr Alistair Malcolm under the name Credit Underwriting Agency Limited. Mr Hilton and Mr Malcolm had been involved in an underwriting agency called Alistair Malcolm Associates Underwriting Agencies Limited ("AMA"), through whom Aegon Insurance Limited ("Aegon") had underwritten credit insurance business. The Harvey Bowring Syndicate and the Venton Syndicate had participated in that business by subscribing to quota share reinsurance of Aegon. Aegon decided to withdraw from

credit insurance business in the autumn of 1994, and HMU approached the Harvey Bowring and Venton syndicates with a proposal that they take over Aegon's business and give them a binding authority to underwrite it.

18. HMU acquired the goodwill, business, staff and equipment of AMA on 2 December 1994. While they were in business, HMU wrote insurance under the first and second binding authorities. They were coverholders under no other binding authorities, and did no other underwriting.

19. Mr Malcolm was HMU's Chairman, and Mr Hilton was the managing director. They employed as their "Corporate Affairs Director" Mr Trevor Beadle, who had first qualified as a barrister and then worked for the solicitors, Messrs Wilde Sapte. Despite his job title, he was not a director of the company. Ms Laura Hollingsworth, a chartered accountant, was HMU's financial controller, and also the company secretary. Both Mr Beadle and Ms Hollingsworth had previously been employed by AMA.

20. On 28 February 1995 the managing agents of three of the participating syndicates (or companies associated with them) entered into an agreement to become shareholders in HMU. Murray Lawrence agreed to take a 10% holding for £124,820, and Venton Underwriting Agencies Limited and D P Mann Underwriting Agency Limited each agreed to buy a 7.5% shareholding for £93,615. It was necessary under the Lloyd's Related Party Byelaw (No 2 of 1986) for the agencies to obtain the consent of the Lloyd's regulatory authorities for them to take these shareholdings, and this consent was given subject to a number of conditions, including one that "premiums received by HMU are held in a trust account for the benefit of names". The managing agents accepted the conditions.

21. By a side-letter agreement, HMU agreed that, provided the agencies held at least 10% of HMU's shares between them, they would be entitled to appoint a nominated director to the board of HMU. In March 1995 Mr Peter Dixon-Clarke, a chartered accountant and an employee of Harvey Bowring, was so appointed. He remained a director until he resigned in January 1997.

22. The second binding authority having been terminated, HMU ceased trading in about September 1997, and provisional liquidators were appointed on 4 September 1997. The company was wound up upon the petition of a representative underwriter on 19 November 1997.

23. In November 1999 the Official Receiver brought proceedings against Mr Hilton and Mr Malcolm for their disqualification as directors. The Official Receiver's evidence included affidavits of Messrs Keeling, Andrews and Dixon-Clarke. However, the proceedings having come on for hearing before Blackburne J in February 2002, the Official Receiver withdrew the application on the fifth day of the hearing and before these witnesses were called to give evidence. The Official Receiver was ordered to pay some of the costs of Mr Hilton and Mr Malcolm on an indemnity basis.

24. One of the allegations of the Official Receiver, which Blackburne J described during the hearing as the central allegation, was that Messrs Hilton and Malcolm were in breach of their duties as directors because a "separate fiduciary account" was not maintained as, it was said, was required by the terms of the binding authorities, and in particular by clause 22k. This allegation foundered because it came to light that the provisional liquidator had in November 1997 sought the advice of solicitors, Messrs Cameron McKenna, about whether funds held by Coutts were the subject of a trust. In their letter of advice dated 14 November 1997 Messrs Cameron McKenna had expressed the opinion that "although there was a contractual obligation on HMU under the [Binding Authority] to establish a fiduciary account, the fact that the account was to be in the manner of an IBA does not ... of itself mean that the account was a trust account". The disqualification proceedings were, it seems, withdrawn not least because it transpired that the Official Receiver had been unaware of Cameron McKenna's advice when the proceedings were launched and the allegation of breach of fiduciary duty was made.

HMU and Coutts

25. In early November 1994 Mr Beadle approached the Lombard Street branch of Coutts about banking facilities for HMU. They had a number of meetings with the manager of the branch, Mr John Mallett, and his assistant, Mr Richard Stubbs.

26. At the first meeting on 8 November 1994, the nature of HMU's proposed business was explained to Coutts, and Mr Beadle is recorded by Coutts as saying that "a contract (a binder) had been agreed, giving [HMU] authority to underwrite on behalf of Lloyd's, together with detailing the authority to pay claims on behalf of the syndicate". Mr Hilton explained to Mr Mallett that HMU would be acting as agents of the insurers, not the insureds, and that insurance debtors and creditors would appear in HMU's balance sheet. It was envisaged that HMU might need an "i.c.o.n." (in case of need) overdraft facility of about £250,000, and Coutts' note of the meeting records that, "It was emphasised that turnover passing through the account will not be reflected in Balance sheet strength".

27. Mr Mallett and Mr Stubbs had a further meeting with Mr Beadle and Ms Hollingsworth on 10 November. In a note dated 10 November 1994 Mr Stubbs wrote, "We need to be ready to move quickly (and efficiently) once Co is ready to go. This having been said, I am conscious that we have to date not seen any formal documentation [meaning, as Mr Stubbs explained in evidence, the memorandum and articles] relating to the new Co. or the binder given by the Lloyd's syndicates relating to future activities. [Mr Mallett] has requested this although Co appears loathe to deliver!"

28. Coutts opened a current account (to which I shall refer as the "general" account) for HMU on about 11 November 1994, and also an interest-bearing reserve account. Coutts asked to see HMU's binding authority, but in a letter dated 16 November 1994 Ms Hollingsworth said that it was being signed through Lloyd's and not yet available to HMU. In cross-examination Mr Mallett said that when Coutts asked to see the

binding authority Mr Hilton had resisted on the grounds that it was a commercially sensitive document. He agreed that in hindsight it was important that the bank should have known the terms upon which HMU were doing business with the syndicates.

29. HMU applied to Coutts for a banking facility with a credit limit of £37,750. In an internal loan form dated 18 November 1994 that he prepared for his superior, Mr J.S. Tough, a Senior Manager, Mr Mallett recommended that Coutts provide it. Commenting upon the possibility that HMU might require an "in case of need" facility in due course, he observed that, "we are not being offered any specific security and arguably none is available".

30. The claimants argue that this note and the record of the meeting of 8 November show that from the start of Coutts' relationship with HMU Mr Mallett was aware that funds held in HMU's accounts would not be their own assets. I do not find this convincing. Whatever their status, funds of an undefined amount in a current account would hardly constitute "specific security" or indicate the strength of the company.

31. On 6 December 1994, Mr Mallett wrote to Mr Hilton outlining the banking arrangements that had been put in place by Coutts, repeating his request to see the binding authority. In their reply dated 12 December 1994 HMU said that they would provide Coutts with a copy of the binding authority as soon as it became available from Lloyd's. Mr Mallett accepted that Coutts did not thereafter press for a copy of the binding authority. Coutts were never given a copy of either the first or the second binding authority, or even had sight of them, before July 1997.

32. In March 1995 HMU sought from Coutts an overdraft facility for £300,000. At a meeting on 24 March 1995, Mr Malcolm and Mr Hilton explained that HMU were contemplating investment in a company called Infocheck Limited ("Infocheck"), who were a provider of corporate financial information used by HMU to assess credit risks. Coutts were informed that Infocheck's financial position was precarious, and that HMU were keen to assist since they relied upon Infocheck's information for underwriting purposes. In a report upon the proposal to Coutts' Credit Risk Department dated 28 March 1995, Mr Mallett and Mr Tough recorded this financial information about HMU: that the main creditors related "to reinsurance premiums payable on behalf of Lloyd's syndicates to third parties, primarily reinsurers in the company market and direct participant payments which effectively are funds due to the syndicates. HMU is something of a hybrid between a broker and an underwriter and as such is not required to hold funds in an insurance broking account. HMU whilst not standing on risk themselves do bind syndicates to take risk. If a client can demonstrate they have paid funds to HMU the syndicate will be obliged to honour the insurance contract regardless of whether HMU have paid them".

33. Mr Mallett and Mr Tough also gave consideration to the security that HMU might provide for such a facility, and said that any mortgage debenture would be of "questionable value". It was suggested to Mr Mallett in cross-examination that this was because it was recognised that any monies passing through HMU deriving from the operation of the binding authority would not belong to HMU, and so would not be

the subject of any debenture given by them. Mr Mallett said that he did not know whether or not that was the explanation for the comment. I do not believe that Mr Mallett had analysed the position in those terms. The comment was made in the context of a recommendation that the facility be made available without Coutts taking a debenture from HMU.

34. Coutts agreed to provide HMU with an overdraft facility up to a maximum of £500,000. However, the Credit Risk Department did require that the terms of the facility, which were sent to HMU on 31 March 1995, included one that HMU provide a debenture. They executed one on 3 April 1995, giving Coutts a fixed and floating charge over their assets. Clause 15 was in the following terms: "In case the Company shall have more than one account with the Bank it shall be lawful for the Bank at any time and without prior notice forthwith to transfer all or any part of any balance standing to the credit of any such account to any other such account which may be in debit but the Bank shall notify the customer of the transfer having been made".

35. In the event Infocheck were not acquired or supported by HMU, but were sold to Equifax, an American company.

36. In early August 1995 HMU requested Coutts to open a second current account for them. It was to be designated a "client" account. The request was made by Ms Hollingsworth. According to Mr Mallett's evidence, Ms Hollingsworth explained that the account had been requested by the underwriters subscribing to the binding authority, that it was being opened for administrative purposes to facilitate the reconciliation of funds held by HMU, that the purpose of the account was to allow the underwriters to see more clearly the "true position" relating to HMU's underwriting activities, and that it was being opened by HMU as a matter of best practice. She asked Coutts to write to Harvey Bowring confirming that the account had been opened. The conversation is not recorded in a written note, but I accept Mr Mallett's evidence about it.

37. Following that conversation, Ms Hollingsworth sent to Mr Stubbs on 4 August 1995 a draft of a letter authorising Coutts to open a second account in the name "Hilton Malcolm client account", which was to operate under the same mandate as the general account. She stated that a signed copy of the letter would be sent to Coutts on the following Monday, 7 August 1995, and, although a signed copy of the letter is not in evidence before me, I infer that it was so sent. Ms Hollingsworth also sent a draft of a letter addressed to underwriters that HMU wished Coutts to write.

38. The description of the new account as a "client account" thus derived, as Mr Mallett confirmed in his evidence, from HMU, that is to say from Ms Hollingsworth's oral request and this letter.

39. In cross-examination, Mr Mallett said that after the conversation with Ms Hollingsworth, he had a further conversation with Mr Beadle about the new account and its designation as a client account. He accepted that Coutts were being asked to

set up something under the name client account, which was not one in the true sense of the term, and that this was an unusual request, one unprecedented in his experience. He said that therefore he wanted HMU to confirm Ms Hollingsworth's request, and Mr Beadle did so. It was not entirely clear from Mr Mallett's evidence when this conversation with Mr Beadle took place. Although at one point Mr Mallett seemed to think otherwise, it seems to me probable that the conversation was on 16 August 1995, after the account had been set up and the undated letter written, and I so find.

40. The client account was opened on 8 August 1995. HMU did not, however, use it immediately. The first movement on the account was on 26 October 1995 when £200,000 was transferred into it from the general account. There was no further activity until 30 November 1995 when a further £110,000 was transferred into it from the general account. The client account was actively used only from about 20 December 1995. Thereafter until July 1997 there were paid into the account substantial sums, which no doubt included, and largely represented, premiums paid to HMU under policies written under the first and second binding authorities, the same account being used for monies relating to both.

41. On 16 August 1995, Mr. Malcolm and Mr. Beadle had a meeting with Mr. Mallett and Mr. Stubbs to discuss HMU's business plans and banking requirements. Although the planned investment in Infocheck had fallen through, HMU wanted Coutts to maintain an overdraft facility of £500,000 on, as it was put, an "in case of need" basis, and they also asked for a further £350,000 to finance their expansion plans. With regard to the client account, Mr. Stubbs wrote this in his note of the meeting, a note which Mr Mallett saw and approved:

> "Requested by Harvey Bowring as lead syndicate to demonstrate best practice to names and whilst no official requirements to segregate funds, HMU wishes to satisfy HB's desires. Account will collect names funds (nominal insurance funds) pending payment to Lloyd's syndicates ... however at the end of the day in the event of HMU going into liquidation the funds remains the Company's, although the legal position is dubious/unclear. ".

42. Mr Stubbs said in evidence that the remark in his note about the legal position was not part of the discussion, but his own observation. Mr Mallett confirmed this, and said that he did not know what it meant. He explained that, in view of Mr Beadle's legal background, and in particular the fact that he had previously worked for Wilde Sapte, a firm instructed by Coutts, he felt that Coutts were entitled to rely upon assurances that Mr Beadle gave them that the funds belonged to HMU. I accept that this was his thinking at the time. It is another question whether it was reasonable for him so to rely upon Mr Beadle, but, as I see it, not one upon which anything turns.

43. Later in August 1995 Mr. Beadle told Mr. Mallett that HMU were considering purchasing the business, or an interest in the business, of one of HMU's brokers, Park Insurance Brokers Limited ("Park Insurance"). Mr Mallett prepared a memorandum dated 30 August 1995 for Coutts' Credit Risk Department, and someone in that department annotated it, "Co's trade is cash positive in pattern & healthy c/a [current

account] is therefore misleading...". Mr Mallett was asked about this note in cross-examination, and expressed the opinion that it reflected the fact that the funds were to be paid to the underwriters.

44. On 1 September 1995 Mr. Mallett wrote to HMU that a further overdraft facility of £350,000 was available to them, setting out the terms of the facility. They included a term for the provision of monthly management accounts, and one confirming that Coutts continued to rely upon the mortgage debenture. In his letter Mr. Mallett observed that for the purposes of calculating interest the facility allowed accounts of associated companies to be offset one against another. He said that he was content to have this arrangement for the accounts of HMU and an associated company called Hilton Malcolm Insurance Brokers, but continued:

> "However, this is only for interest purposes and I would not anticipate seeing any borrowing in excess of £350,000 regardless of credit balances held on "other" accounts".

In due course HMU acquired the business of Park Insurance.

45. On 25 October 1995, at a meeting with Mr. Mallett, Mr. Beadle asked that the overdraft facility be increased to £500,000 in order to fund HMU's plans to set up a service to obtain credit information and to assess credit limits for policy holders of HMU, replacing the services previously provided to HMU by Infocheck. At the meeting, Coutts reminded HMU that management accounts had not been provided as required by the letter of 1 September 1995, but despite this reminder, HMU continued to be late in providing their management accounts to Coutts.

46. In November 1995 HMU sought a term loan to assist in the formation of a company that was to obtain credit information and supply it to HMU. The company was acquired off the shelf, changed its name to Eastcheap Data Limited on 5 December 1995 and then changed its name again on 2 December 1996 to Hilton Malcolm Network Limited: I shall refer to it as "HM Network". Coutts were not prepared to provide finance for HM Network on a "stand alone" basis, but Mr Mallett suggested that they provide finance through HMU, HMU making an inter-company loan to HM Network. This suggestion was adopted. On 6 December 1995 Coutts wrote to HMU offering a £400,000 term loan for funding HM Network, in addition to the existing overdraft facility of £350,000. The loan was to be secured on the mortgage debenture of 5 April 1995, a guarantee from HM Network and a mortgage debenture over HM Network's assets. HM Network executed the debenture on 18 December 1995. The funds were advanced in January 1996.

47. On 18 January 1996 the debit balance in HMU's general account was approaching the limit of £350,000, and £60,000 was transferred to it from the client account in order to keep it within the overdraft limit. The position was discussed between Mr. Beadle and Mr. Stubbs on 25 January. Mr. Beadle said that he understood the overdraft facility to be on a "net basis", that is to say, that the limit of £350,000 applied to the

debit balance offset against any credit balance on the client account. Mr. Stubbs' note of the meeting continued,

> "I explained this was not the case and that o/d [overdraft] was gross and whilst we were prepared to set off funds for interest purposes we had not agreed to do so for limit purposes. He next question [sic], quite surprisingly! was would/could we."

48. Mr. Mallett added an observation in manuscript to Mr. Stubbs' note, indicating that the overdraft should not be on a net basis because only commission payments were due to HMU from the client account. Both Mr Mallett and Mr Stubbs accepted in cross-examination that this reflected a recognition that the monies in the client account were not ultimately HMU's monies in that they were to be paid to the claimants and policyholders.

49. Mr Mallett also added the observation, "May wish to see binder agreement". This was prompted by Mr. Stubbs' comment, "We need to be sure as to the legal standing of the client a/c as setting off for limit purposes gives me, (and no doubt credit risk) the jitters!" Mr Mallett was asked whether when he read Mr Stubbs' note, he thought of the undated letter and had any concern about the reference in it to a client account. He replied, and I accept, that he did not remember the letter. He also said that, with the benefit of hindsight, he thought that he should have done so.

50. At about the beginning of February 1996, Coutts began to operate an arrangement which has been called a "sweeper", whereby funds were to be automatically transferred from the client account to the general account if and when necessary in order to keep the latter within the limit of £350,000. There is no direct evidence upon whose initiative this arrangement was introduced. It was operated with the consent of both parties. Mr. Julian Flaux QC, who represents the claimants, pointed out the Coutts would have been entitled under clause 15 of the mortgage debenture themselves to introduce an arrangement for transfers of this kind from the client account to any other account of HMU that was in debit. If they had done so, clause 15 required Coutts to give notice to HMU, and I would have expected a record of such formal notification to HMU if Coutts had resorted to their powers under the debenture. It is more likely that HMU mandated Coutts to introduce the arrangement, and I so find. That is in accordance with the evidence of Mr. Mallett that, while he did not know who put the sweeper arrangement in place and did not recall doing so himself, typically the customer would give a mandate for an arrangement of this kind.

51. Coutts were apparently less than happy about the sweeper arrangement (as I shall call it) as a long-term answer to HMU's borrowing. In an internal note made on 1 February 1996 it was observed,

> "We need to resolve the situation with regard to maintaining the current account with agreed limit. There is presently an automatic transfer to maintain a balance of £350K by transfers from the "client" account. We do not want this to remain as we

> will be left with a hardcore overdraft which was not the intention of the facility".

Mr Mallett said that the sweeper arrangement was introduced to deal with an "emergency situation" and it was "unacceptable" to have a long-term arrangement of this kind.

52. On 5 February 1996 Mr. Stubbs and Mr. Simon Gleeson, a loan officer at Coutts, met Ms Hollingsworth and Mr Beadle. According to Coutts' record of the meeting, Mr Beadle explained that the purpose of the client account was that the underwriters could "obtain some comfort in seeing the funds separate from Hilton Malcolm's own, although they are aware that this is only a pool of funds and that not all is due to the clients. It shows HMU's ability to make the quarterly bordereau payments to Lloyd's". After the meeting Mr. Mallett wrote to Mr. Beadle on 8 February 1996 about using the funds in the client account to keep the general account within its overdraft limit. He said,

> "I understand "Lloyd's" wish to segregate the client's funds to enable them to keep an eye on matters. I do, however, feel slightly uncomfortable with looking to "clients" funds to offset any borrowing, and whilst I accept the reasons in this case, I feel I must ask you formally to confirm that there is no prior charge/lien over these funds, in any agreements you may have with "capital" providers specifically in the binding authority".

Mr Mallett explained in evidence that the reason for Coutts' concern was that "the account was earmarked "clients" and my understanding at the time was we could not take charge over clients' accounts, but we were assured that this was not a true clients' account".

53. Mr. Beadle's reply, dated 20 February 1996, was that he could confirm that there was no charge or lien over the "clients" funds which were kept in the client account, and that "The precise wording in the agreement between Hilton Malcolm and the capacity is that we will maintain the client account in the manner of an IBA but subject to the practical difficulties that arise from our non broker status". The evidence of Mr Mallett and Mr Stubbs was that this was considered a satisfactory explanation: that it provided them with confirmation that Coutts were able to take comfort from the funds held in the client account; that the account was in place for accounting and management information purposes; and that the funds in it were subject to Coutts' security.

54. In cross-examination Mr Mallett accepted that if he had seen the binder agreement, and in particular read clause 22k, there would have been no question of Coutts allowing any sort of set-off between the client account and any other account, and Coutts would not have accepted the sweeper arrangement. He agreed that the operation of the sweeper was inconsistent with HMU's account being a client account "in the true sense". He was pressed with questions about whether Coutts should have

informed the underwriters about the sweeper arrangement. While appearing somewhat hesitantly to accept that they should have done so, Mr Mallett expressed uncertainty about this, questioning whether Coutts could have given this information without HMU's consent – having in mind, as I understood him, Coutts' obligations of confidentiality to their customer.

55. Despite Mr Beadle's assurances, from time to time in 1996 questions were asked within Coutts about the funds in the client account and about the bank's security for the facilities that they were providing to HMU. There were indications that HMU and their associated companies were not performing as well as had been hoped. In a note of a meeting with Mr. Beadle on 20 September 1996, Coutts recorded this:

> "The Company's accounts with the Bank have been running reasonably well and whilst the limits have not been exceeded the hardcore position on the current account is something that required further explanation. Hilton Malcolm have effectively segregated the balances that are due to the ultimate underwriters and whilst there are healthy balances which could be caught under our own debenture it would be a little disconcerting to see the overdraft at such a level on a hardcore basis as this could almost be construed as quasi capital for the business..."

56. In a telephone conversation with Mr. Beadle on 21 November 1996, Mr. Mallett discussed whether funds in the client account could be offset against HMU's other account balances in the event of HMU's liquidation. Mr. Mallett's note of the conversation records that: "Whilst on the phone we discussed the potential ramifications of funds being held in the 'clients a/c' on liquidation of the Company in terms of there being questions whether we were able to set funds off. [Mr. Beadle] was adamant we can and therefore we agreed to change the name to 'underwriting account'".

57. Accordingly Mr. Mallett arranged for the name of the account to be changed to "underwriting account". His evidence about how this change came about was this: "My recollection is that he said, "Look, it is not a true client account", in terms of how you might describe a solicitors' client account as an example, and I think he said to us: "Well, okay, if you are uncomfortable about that particular name, what title would you like to give it?" I cannot remember whether he came up with "underwriting", or whether I came up with "underwriting" or "trading" but we agreed that was a fair reflection of what the account represented." It did not occur to him, when the name of the account was changed, to write to underwriters to clarify or to qualify the undated letter. (Despite the change of name, I shall continue to refer to the account in this judgment as the "client" account.)

58. By 11 December 1996, HMU owed Coutts £357,880 on their loan account and £350,000 on the overdrawn current account. Coutts' Credit Risk Department gave their approval for these facilities to be continued on terms set out in a facility letter dated 16 December 1996. They included a negative pledge, prohibiting HMU from

giving any charge over its assets without Coutts' prior written consent. The Credit Risk Department, when approving the renewed facility, asked that Mr. Mallett clarify the following point: "Your original submission [of March 1995] explained that the underwriting syndicates would be obliged to maintain cover in respect of premiums paid to HMU – it does seem rather harsh (on them!) for this to apply even when premiums have not been physically paid – we wonder if, for this element, the syndicates do have a right to either collect future instalments direct, or alternatively withdraw cover for the unpaid period. This could dramatically alter our perception of security values".

Mr Mallett raised this question with Mr Beadle when he sent a letter dated 20 December 1996 renewing HMU's facilities.

59. By late December 1996 or early January 1997 it had become apparent that HMU were obliged to repay to the underwriters £400,000 by way of rebate of commission. By an agreement dated 3 January 1996, the underwriters agreed to defer this repayment until 31 January 1998, and also to extend the second binding authority to 31 January 1997. Security by way of charges was provided to the underwriters by HMU, and also, for reasons that I shall explain, by their parent company, Hilton Malcolm Jersey Limited ("HM Jersey") and by HM Network.

60. On 7 January 1997 Mr. Beadle telephoned Mr. Mallett to tell him that HMU were obliged to make this commission repayment and to inform him of the agreement that had been reached with the underwriters. In order to comply with it, HMU needed Coutts to release HM Network's debenture of 18 December 1995 and their consent to relax the negative pledge in the facility letter. In his note of this conversation Mr. Mallett wrote this:

> "I am not quite sure how a charge over the shares of Hilton Malcolm Underwriting would potentially affect our own mortgage debenture and our ability to exercise our powers in this respect. To say I am uncomfortable would not be unreasonable and accordingly I have agreed to meet Trevor [Beadle] on Wednesday 15th January to discuss this in further detail and also the points raised in my covering letter with the facility letter."

61. In a submission to the Credit Risk Department made on 21 January 1997, Mr Mallett and Mr Tough requested that the HM Network debenture be released. It appears that Mr Mallett had had some discussions with Mr Beadle about the position if premiums paid by the insured were not passed to the underwriters, but Coutts' concerns were not entirely allayed. Mr Mallett and Mr Tough wrote: "Once Hilton Malcolm, on behalf of the syndicate has agreed a premium for an underwriting risk then regardless of whether or not Hilton Malcolm pay the underwriters these syndicates are obliged to remain on risk…Whilst it is quite clear that cover could now be withdrawn the syndicates' right to collect future premium instalments is not as clearly defined as we

would like". On 23 January 1997, Coutts agreed to release the HM Network debenture.

62. In July 1997, shortly after the underwriters terminated the second binding authority, Mr. Mallett and Mr. Tough attending a meeting with Mr Beadle and HMU's lawyers to discuss HMU's position. It was at about this time that Coutts first saw the terms of the binding authorities. On 15 July 1997 Coutts wrote to HMU demanding immediate repayment of £227,420.38, the net balance owed to them by HMU.

63. At the beginning of October 1997 there was some £572,419 in the client account. On 2 and 3 October 1997 Coutts transferred this amount to discharge HMU's debit balance of £294,500 on the loan account and to reduce their debit balance of over £300,000 on the general account.

The relationship between Harvey Bowring and HMU to August 1995

64. I return to the relationship between HMU and the underwriters, particularly Harvey Bowring. In April 1995 Mr Andrews had two meetings with Mr Hilton. The first, on 19 April, was also attended by Mr Doughty, and underwriting issues were discussed. At the second meeting, on 25 April, there was discussion of a variety of questions including some contentious claims, rate monitoring and modelling, a new computer system and overseas business. Mr Andrews thought that at the meetings Mr Hilton was evasive and reluctant to provide information.

65. At about the same time, Mr Dixon-Clarke, having been appointed a director of HMU, was also finding it difficult to obtain information from Mr Hilton about the business. He was concerned, according to his evidence, that he had not seen figures to show how HMU were performing; that he had seen nothing to show that HMU's bank accounts were set up and properly maintained; and that he was not receiving notices or minutes of board meetings or other formal management meetings. When he raised his concerns about formal meetings, Mr Beadle told him in a note dated 4 July 1995 that the last management meeting to result in a minute was held in March 1995, because minutes were only produced if "the material justifies it".

66. Against this background, in July 1995 Mr. Dixon-Clarke learned from Ms Hollingsworth that no segregated bank account was being maintained by HMU for underwriting funds. She told him that she had been managing the underwriting accounts without one, and had not been instructed to do differently. Mr. Dixon-Clarke's evidence, which I accept, was that he was surprised by this news, having previously understood that a separate bank account was being maintained. He told Mr. Andrews what he had learned, and on 13 July 1995 Mr. Andrews wrote to Mr. Parshall of Carpenter Bowring that he was led to believe that HMU were in violation of clause 22k of the binding agreement, and that he was extremely concerned about the position. He asked that the brokers instruct HMU to comply immediately with the condition, and to confirm in writing that they were doing so.

67. This provoked two letters from Mr. Hilton. Their tone was not conciliatory. In a letter to Mr. Parshall he wrote that HMU had maintained "a memorandum account in the manner of an IBA account, as agreed when the binder was originally negotiated", and therefore had complied with condition 22k. In a letter to Mr. Dixon-Clarke, which was marked "Private and Confidential", he complained that Mr. Dixon-Clarke had "Chose[n] to review the matter with John Andrews before discussing the matter with me or any other director".

68. This response caused considerable annoyance to Harvey Bowring, and in particular to Mr. Andrews and Mr Keeling. Mr. Keeling telephoned Mr. Hilton and told him "in no uncertain terms" not to write such letters to Harvey Bowring's employees, and to open a further bank account immediately. He also had a meeting with Carpenter Bowring to enlist their support in dealing with the problem. He made his concerns clear to them, and said that he wanted some reassurance from someone other than Mr Hilton that the matter would be dealt with.

69. Whether as a result of Mr. Keeling's telephone conversation with Mr. Hilton or as a result of representations from the brokers, HMU modified their position. By a letter dated 20 July 1995 to Mr. Keeling, Mr. Hilton wrote that HMU had decided that it was "now appropriate to open a separate bank account which we will operate in the manner of an IBA and which will hold fiduciary funds for the benefit of third parties rather than for the use of HMU in its day to day business. I would emphasize that we have always maintained memorandum accounts to achieve this in accordance with provision K of the Binding Authorities. Our decision to open a separate bank account as opposed to maintaining a memorandum account within the business is to allow physical separation of funds".

70. Harvey Bowring responded in a letter from Mr. Andrews to Carpenter Bowring dated 24 July 1995. It was headed "Hilton Malcolm Underwriting Limited, Fiduciary Account". In it Mr. Andrews wrote that Harvey Bowring were "heartened" by HMU's action and asked "that you forward to us copies of all the relevant documentation in order that we may both complete our files and also confirm to the relevant Lloyd's departments that the IBA requirement is being met". He did not receive a written reply to it. It is to be observed, first, that the request was made of Carpenter Bowring rather than of HMU or their bank, and, secondly, no particular form of "documentation" was sought.

71. It was the evidence of Mr. Doughty that he and Mr. Nigel Barton of DP Mann had a meeting with Mr. Keeling and Mr. Andrews to discuss HMU's failure to open a separate account. In his witness statement he said that he did not remember the meeting in detail. He did not say when it had taken place, except that it was shortly after it was discovered that that HMU did not have a separate bank account. (In fact he said that this was learned in July 1996 some time after the binding authority was renewed, but this was an obvious aberration that Mr Doughty corrected in his evidence in chief.)

72. In his oral evidence Mr. Doughty said that the meeting took place on 19 July 1995; and that he knew this because he recalled that it was a lunchtime meeting, and his electronic diary showed that 19 July 1995 was the only day during the relevant period when he would have been available for it. More importantly, he said that he remembered the meeting "vividly", and that the "collective opinion of the meeting" was not only that an account should be opened by HMU but also that "we should have confirmation, from the people who opened the account, that it had been opened." He said that that amounted to confirmation "from whoever the bank was".

73. I am unable to accept this oral evidence of Mr. Doughty.

i) First, it is inconsistent with his witness statement, and he did not, in my judgment, explain this difference satisfactorily.

ii) Secondly, Mr Doughty's evidence about the meeting was not supported by any other witness. Mr. Andrews said nothing of a meeting with Mr. Doughty. Nor did Mr. Keeling. Mr. Barton did not give evidence.

iii) Thirdly, by 19 July 1995 HMU had not agreed to open a separate account. The question of confirmation of a promise to do so had not arisen. Mr Keeling said that he had had a meeting with the brokers at around this time (he thought shortly before 20 July 1995), and was certain that he did not discuss independent confirmation of this kind.

iv) Fourthly, when HMU did agree to open a separate account, Harvey Bowring did not seek confirmation from the bank operating it. In his letter of 24 July, Mr Andrews simply asked for "copies of all the relevant documentation". Mr Keeling's evidence was that he was concerned only to have a commitment from someone other that Mr Hilton: when asked in cross-examination whether he wanted independent confirmation from a bank, he replied: "No, I am not saying that. I am absolutely sure that I called the broker in, and said "I am very concerned about what Hilton says", and getting some reassurance from someone other than Hilton that this is actually going to happen". Harvey Bowring wished to have someone other than Mr Hilton involved, because, according to Mr Keeling, HMU trusted Mr Hilton less than Mr Malcolm, whom they thought to be "an honest person": "There was more suspicion ... of Mr Hilton". I do not believe that Mr Keeling and Mr Andrews would have made their requests of the brokers in these terms if they had been party to the discussion described by Mr Doughty.

74. On 4 August 1995, there was a meeting between Mr. Hilton and Mr. Malcolm representing HMU, Mr. Andrews and Mr. Dixon-Clarke of Harvey Bowring, and Mr. Parshall. Mr. Andrews made a note of the meeting, which includes the following:

> "Binder A/C: Separate <u>fiduciary</u> A/C being set up at Coutts".

It is apparent that there was some discussion of the new account in the presence of Mr Malcolm as well as Mr Hilton, although Mr. Andrews said that he does not recall the details of what was said. Effectively, I infer, Mr Malcolm endorsed what Mr Hilton had said in the letter of 20 July 1995 about an account being opened. Mr Andrews did not suggest in his evidence that he asked for verification of what he was told or reminded either HMU or the brokers of his request for relevant documentation. Mr. Dixon-Clarke did not give evidence about this meeting: he did not refer to it in his witness statements, and, in the circumstances that I shall explain, he was not cross-examined about it.

The undated letter

75. On 4 August 1995, Ms Hollingworth, as I have mentioned, sent to Mr. Stubbs at Coutts a draft of a letter that HMU asked Coutts to write. The draft was as follows:

> "To Harvey Bowring and Others (On behalf of certain Lloyd's syndicates described below).
>
> Dear Sirs,
>
> Coutts and Co... as bankers to [HMU] understand and accept that whilst HM have instructed us that they have complete authority over the movements into and out of the HM client account, funds remaining to the credit of the HMU client account from day to day represent net insurers premium payable (in accordance with bordereaux accounts which have been or are to be finalised) to the Lloyd's syndicates participating in HM's binding authority at Lloyd's. HM shall notify us of the identity of such syndicates upon request from time to time.
>
> We understand the syndicates at today's date to be:..."

There were set out the nine syndicates participating in the first binding authority.

76. On 9 August 1995 Mr. Mallett responded to this request. He had previously spoken to Ms Hollingsworth on the telephone, and had made amendments to HMU's draft. He wrote to Mr Hollingsworth that the "Bank does not wish to be placed in the position of being "Policeman" on behalf of a third party i.e. Harvey Bowring & Others and therefore, I have deleted the last sentence regarding the need for Hilton Malcolm to notify the Bank of the identity of the Syndicates for which the funds are being held from time to time." He also said that he had some difficulty with the statement about what the funds in the account represented. He pointed out that at any time the account might include funds that were "in transit in relation to claims and therefore not due to the Syndicates in accordance with any bordereaux accounts that have been prepared by you. Without appreciating the finer points of detail behind your request, I did find it a little difficult to come up with any more appropriate wording." He suggested that, having considered his revised draft, HMU let Coutts know how they wished to proceed.

77. Under cover of this letter Mr. Mallett sent his "revised draft", the undated letter addressed "To whom it may concern for and on behalf of Harvey Bowring & Others". It read as follows:

> "Dear Sirs,
> Hilton Malcolm Underwriting Limited - Client Account.
>
> Coutts and Co... as bankers to the above mentioned Company hereby formerly (sic) acknowledge that whilst Hilton Malcolm Underwriting Ltd have complete authority over the operation of the above account, such funds as remaining to the credit of the client account from day-to-day will represent a combination of claims due and insurance premiums payable in accordance with bordereaux accounts which are either in the course of, or have been finalised, all relating specifically to the Lloyd's Syndicates participating in Hilton Malcolm Underwriting Limited's binding authority at Lloyd's".

It was signed by Mr. Mallett as "Manager, Commercial Banking, For and on behalf of Coutts and Co".

78. The only copy of the undated letter that was disclosed in these proceedings by the claimants was one which had been received by their solicitors, Messrs Barlow Lyde & Gilbert, by fax on 11 July 1997. Neither Harvey Bowring nor any other claimant has, as I was told and as I accept, any other copy of the letter in their possession. Undoubtedly Harvey Bowring did have a copy of the undated letter in July 1997. Mr. Ventiroso found a copy of the letter on Harvey Bowring's files after someone in Harvey Bowring had recalled it, and he faxed it with other papers to the solicitors. It is a mystery what has happened to the original copy of the letter that was faxed.

79. I conclude that the letter that was so faxed was a copy of the letter that had been handed to Mr. Dixon-Clarke by Mr. Beadle. Mr. Dixon-Clarke's evidence was that he was shown the undated letter by Mr. Beadle, and that it was with, perhaps attached to, Mr Mallett's covering letter to Ms Hollingsworth dated 9 August 1995. Mr Dixon-Clarke said under cross-examination that he took a copy of the letter through force of habit. I accept this evidence. It is apparent that he also took a copy of the covering letter: Mr. Ventiroso included it amongst the documents sent by fax to Barlow Lyde & Gilbert in July 1997, having found the covering letter in the same file as the undated letter. There is no evidence that any other person in HMU might have had a copy of the covering letter, or even seen it. In particular, Mr Andrews did not say that he was shown it.

80. In coming to the conclusion that the undated letter which Mr. Ventiroso sent to Barlow Lyde & Gilbert in July 1997 was provided by Mr Beadle to Mr. Dixon-Clarke, I have not overlooked the evidence of Mr. Ventiroso that he was inclined to think that he found it on an underwriting file. Mr. Dixon-Clarke, who was not involved with underwriting, is prima facie unlikely to have filed the letter there. However, Mr. Ventiroso made it clear that he only had a very tentative recollection of where he

found the letters. When asked in cross-examination which file the documents came from, he said:

> "My understanding is I found these documents on 11th July 1997 and I do not have an absolutely clear recollection. I thought they were on the Syndicate underwriting file".

In re-examination he said:

> "I think they came from one file. They were not many copies of it around like on lots of separate files. That is what I do remember. My remembrance is the underwriting file, but it is not clear".

81. The claimants' pleaded case is that the undated letter was provided to Mr. Andrews by Mr Parshall. If it was, it would follow that two copies of the undated letter have been lost. The evidence from the Harvey Bowring witnesses does not support the pleaded case. Mr. Andrews' witness statement (the accuracy of which he confirmed in his evidence-in-chief) said that he recalled being shown the undated letter by the broker, Mr. Parshall, although he did not recall when in August 1995 he saw it. He did refer to "receipt" of the undated letter, but I do not read his witness statement as a whole as supporting a case that a copy of the undated letter had been provided to, or was taken by, Mr. Andrews. In cross-examination he said that he had a "specific recollection" of being shown the letter by Mr Parshall one afternoon in his underwriting box at Lloyd's, and of reading it through, but he could not be certain whether he received a copy of it. Mr. Keeling said in cross-examination that he recollected Mr. Andrews confirming to him that he had seen something from Coutts, but his evidence did not support the case that Mr Andrews received a copy of the letter.

82. The claimants' pleaded case that Mr. Andrews received a copy of the letter was supported only by some oral evidence given by Mr. Doughty in cross-examination. He told me that he had been shown a copy of the undated letter by Mr. Andrews. This evidence had not been foreshadowed in Mr. Doughty's witness statement: indeed, he said that he did not recall when he saw the undated letter for the first time. There was no suggestion from Mr. Andrews that he had shown the letter to Mr. Doughty or indeed to anybody. I reject this evidence of Mr Doughty. I conclude that the claimants have failed to make out their pleaded case that a copy of the letter was provided to Mr. Andrews.

83. Although, as I shall explain, I have generally been cautious about accepting Mr. Andrews' recollection of events where it is not corroborated by other evidence, I conclude that it is likely that Mr. Andrews is correct that he was shown a copy of the letter in his underwriting box at Lloyd's by Mr. Parshall. The letter was addressed by Coutts "To whom it may concern for and behalf of Harvey Bowring & Others". I infer that HMU obtained it in order to satisfy the underwriters, and in particular Harvey Bowring. The question of the separate account had been raised by Harvey Bowring in the presence of the brokers on 4 August 1995, and in these circumstances

it would have been natural for HMU to have provided the letter to the brokers, and equally natural for Mr. Parshall to have shown it to Mr. Andrews.

84. Mr. Ali Malek QC, who appears for Coutts, submitted that the claimants have not discharged the burden of proving that Mr. Andrews was shown the letter. Mr Andrews acknowledged in his evidence that he did not recall how long his meeting with Mr Parshall took and had no recollection as to whether or not he asked for a copy of the letter. Mr Malek argued that it is unlikely that Mr. Andrews would remember an event to which, on his own evidence, he attached little importance at the time, and about which he can remember little. I do not consider these observations to be sufficient reason to reject a version of events that I consider to be inherently probable.

85. Mr. Malek also argued that, if Mr. Andrews had been shown the undated letter, he would surely have kept a copy of it. I do not find this convincing. Despite Mr. Andrews' reference in the letter of 20 July 1995 to his wish to "complete the file", I do not find it remarkable that a Lloyd's underwriter in the middle of the 1990's did not take a copy of a letter of this kind, expecting, no doubt, that it would be kept by the brokers.

86. I therefore conclude that Mr. Andrews was shown the undated letter in August 1995. I have reached this conclusion without relying upon the corroborative evidence of Mr. Keeling, but I also accept his evidence that Mr. Andrews mentioned the letter to him.

The relationship between Harvey Bowring and HMU after August 1995

87. In December 1995 and January 1996 the claimants, other than Lloyd's Syndicate 1028, subscribed to the slip for the second binding authority. As I have mentioned, no wording was drawn up, and the terms of the second binding authority are contained in the slip.

88. An initial renewal meeting had taken place on 27 October 1995. The client account was not discussed. However, before subscribing to the second binding authority, Harvey Bowring set out a list of "Renewal Requirements", including this: "Could HMU please confirm that all funds relating to the binding authority are deposited directly into the fiduciary account, from which commissions and other allowances are taken". On one copy of the list, Mr Andrews wrote against this requirement, "Agreed". By a letter to Carpenter Bowring dated 19 December 1995 Mr Hilton wrote that, "HMU are pleased to confirm that all funds relating to the binding authority are directly deposited in the fiduciary account from which commission and other allowances are taken". In his witness statement, Mr Andrews said that during a renewal meeting HMU assured Harvey Bowring that monies relating to the binding authorities were being placed in the client account, but in his oral evidence he told me that he could not recall such a conversation and that he believed that Mr Parshall showed him a letter. I accept that Mr Andrews received some assurance from HMU, but it is impossible to say whether it was oral or whether he saw the letter to Carpenter Bowring.

89. Before the first binding authority ended and the second binding authority had been subscribed, in November 1995 Harvey Bowring instructed Mr. Martin Rodney-Smith of Whittington Rodney-Smith Limited ("Whittington"), who have been described as "inspection agents", to carry out a claims audit of HMU. In Whittington's letter of instruction dated 23 November 1995, a letter which followed an introductory meeting between Mr Rodney-Smith and Mr Dixon-Clarke, Mr. Keeling wrote, " The aim of this audit is to confirm that claims handling and notification procedures occur as we expect them to". He said that he wanted Whittington to look, first, at procedures relevant to the relationship between HMU and insureds and, secondly, at procedures relevant to the relationship between HMU and insurers; and said that he would expect Whittington to "focus [their] time" on the former. However, with regard to the latter, Mr Keeling requested that Whittington should "confirm compliance or otherwise" with, among other provisions, the condition that HMU should maintain a separate fiduciary account.

90. On 12 January 1996 Whittington produced a report ("the first Whittington report") in response to these instructions. Harvey Bowring saw it when it was produced, but it appears likely from the documents, and I find, that it was not passed to the following market for some 2 or 3 months.

91. In their first report Whittington stated that they had raised with HMU the subject of the segregation of "Underwriters' funds" from HMU's general funds, and had initially been given the impression that premiums were credited to HMU's general account before being transferred to the "fiduciary account" (as they referred to the client account). They reported that, when they pursued this matter, HMU informed them that premiums were paid directly into the fiduciary account, and only HMU's commission was credited to their general account. They said that, "the suggestion was made that perhaps the explanation given to [them] earlier had been a little unclear but that HMU's procedures now conformed with the terms of the binding authority agreement and have done so for some time". Whittington were "left in doubt as to whether this had always been the case". In their conclusions Whittington recorded HMU's assurance that they were complying with the terms of the binding authority in this regard, but commented that they remained "somewhat unclear in this respect", and suggested that the matter should be considered in a further review of HMU's operations, which they advised.

92. In June 1996 Whittington produced what they called an "executive summary" ("the second Whittington report"), the purpose of which was said to be "to provide details of those of our findings and observations which relate to matters of potential seriousness as opposed to those of a more general or administrative nature". In it Whittington identified what they called four main points of significance, including this: "At the date of our earlier report the operation of the fiduciary account remained somewhat unclear and further work was envisaged in order to clarify the matter and provide the comfort required by underwriters. Following our subsequent discussions with the lead underwriter it has been decided that the most appropriate course of action is for the broker to be requested to resolve this matter".

93. This point was picked up by Mr. Alan Grant, the active underwriter of Syndicate 991. By a letter dated 8 August 1996, he asked Mr. Parshall of Carpenter Bowring, "What has been resolved as regards the segregation of moneys in a Fiduciary account?" There was apparently no written reply to the letter, and Mr Grant did not know what, if anything, was done by the brokers in response to his letter.

94. I do not doubt that the second Whittington report reflects discussions between Harvey Bowring and Whittington. Mr Andrews said in a witness statement dated 2 May 2003, that is to say a statement signed after the trial had started, that he could not remember precisely what conversations he had with the broker about the point that Whittington had raised, but said that he did recall that Harvey Bowring asked the broker to check that HMU were processing claims money correctly, and were satisfied by HMU's assurances. However, in cross-examination he said that these assurances were in a letter sent in January 1996, and not in response to the second Whittington report.

95. Thus Whittington raised concerns about the operation of the fiduciary account in both their reports and discussed them with Harvey Bowring. As far as Whittington were concerned, the question was left on the basis that it would be resolved by the lead underwriter pursuing it with Carpenter Bowring. There is no document reflecting any exchanges between Harvey Bowring and the brokers about this matter. It is clear that Harvey Bowring did not insist upon Carpenter Bowring properly investigating the operation of the client account. There is no evidence that I accept that, following their discussions with Whittington and the second Whittington report, Harvey Bowring raised the matter with Carpenter Bowring at all.

96. It is impossible to tell from Mr Andrews' evidence why Harvey Bowring did not do so. It was a remarkable omission on their part. Mr. Andrews explained that Harvey Bowring understood the comments in the first Whittington report to have been misplaced because they had been told by Coutts that a separate fiduciary account was being operated. As far as the evidence before me goes, nobody else either in Harvey Bowring or the following market was told that Mr. Andrews considered the comments misplaced. I am unable to accept Mr Andrews' explanation. If he had considered that the comments in the first Whittington report were misplaced, this would surely have been mentioned in the discussions referred to in the second Whittington report, and the second Whittington report would have reflected this. In any case Mr Andrews' explanation would not answer Whittington's point. Whittington were concerned about how HMU were depositing money into the account, and the undated letter did not deal with that.

97. Mr Dixon-Clarke's evidence was that the first Whittington report gave him no reason to suspect that HMU were not properly processing the underwriting funds through the client account. Mr. Doughty told me that on his reading of the first Whittington report, he "considered the matter closed". I find it difficult to understand how they could have drawn these conclusions from the first Whittington report, and I cannot accept that that they would have maintained these views if they had read the second Whittington report with due care.

98. On 4 January 1996, Mr Andrews wrote a letter to Carpenter Bowring explaining the basis upon which Harvey Bowring were giving the second binding authority. He said that they intended to carry out an underwriting review in May 1996, and in light of the findings they might wish to adjust commission terms for the remainder of the second binding authority. The review took place during the week of 8 July 1996. As a result, Mr Andrews drew up a list of "action points" dated 17 July 1996, and included in the list that HMU should supply the underwriters with the audited accounts of the company for the year ended 31 December 1995 and the management accounts as at 30 June 1996. It became apparent from the review that because of poor underwriting results HMU were going to earn only the minimum rate of commission of 26.5% of the gross premiums, and were going to have to repay in due course some £400,000 of the provisional commission that they had been paid. Harvey Bowring also sought, and arranged, an adjustment of the commission rate for the remainder of the period of the second binding authority.

99. In his witness statement, Mr Dixon-Clarke said that towards the end of his relationship with HMU he became aware that HMU were borrowing from Coutts and that, as far as he recalled, he would have assumed that the borrowing was unsecured. It would have been remarkable if a director knew so little of the affairs of the company, and I cannot accept this evidence. First, there were disclosed by Harvey Bowring two copies of Coutts' facility letter of 6 December 1995, which refers both to the facilities being made available to HMU and the debenture of 3 April 1995. I infer that Mr Dixon-Clarke had seen this letter while a director of HMU. Secondly, Mr Dixon-Clarke's statement is inconsistent with two notes made by Ms Liz Richardson, a chartered accountant who worked for D P Mann and who was their company secretary. In notes dated 15 February and 27 September 1996, she recorded discussions with Mr Dixon-Clarke about HMU's bank facilities.

100. Although a director of HMU, Mr Dixon-Clarke did not receive any management accounts of HMU during the time that the first binding authority was being operated, a matter that caused him concern. From early 1996 he did receive monthly management accounts from HMU. They presented a single figure for "cash at bank". Mr Dixon-Clarke realised that the accounts did not give a breakdown between company funds and policyholder funds, and he requested of Mr Malcolm that this be provided. It never was. However, I infer that Mr Dixon-Clarke never put a request for this information in writing, and, as far as the evidence goes, he took no decisive steps to obtain the information that he requested.

101. Nor does it seem that the information that was in management accounts caused Mr Dixon-Clarke, or anyone at Harvey Bowring, any concern about HMU's financial position or the management of the underwriting funds that they held. The balance sheet in the accounts for March 1996 showed cash at the bank in the sum of £129,098. This was at the end of a quarterly period, a time at which the client account would be expected to be holding funds pending payment to the underwriters. In fact, in May 1996 something in excess of £1million was paid to the underwriters. If those funds were in HMU's client account and included in the combined "cash at bank" figure, the indication was that HMU were carrying heavy liabilities on their other bank accounts.

The management accounts for September 1996, at the end of another accounting period, showed cash at the bank to be in deficit in the sum of £183,687.

102. None of this information led Mr. Dixon-Clarke to suspect that HMU were not keeping proper bank accounts, or to question HMU's financial procedures with any energy. His evidence was that it did not occur to him to ask for underlying financial information because this would have been the equivalent of accusing his fellow directors of lying. I cannot accept this explanation. It would certainly not have been a proper restraint for a director to impose upon himself.

103. Mr. Dixon-Clarke received a copy of the annual accounts in July 1996, and he is referred to as being present at a meeting of the directors of HMU on 30 July 1996 when a resolution was passed to approve the accounts. Mr. Andrews also saw the audited accounts at about this time. Like the management accounts, they showed a single figure for "Cash at bank and in hand". Both Mr Dixon-Clarke and Mr Andrews said that, when they saw the accounts, they were concerned about the results that they showed, and Mr Andrews observed that, taking into account that HMU were going to have to repay some of the commission, their outgoings seemed to exceed their income. However, neither were concerned that the accounts did not show the underwriting funds separately from HMU's other funds. Mr Dixon-Clarke said that he would not necessarily have expected the audited accounts to show these funds separately. Apart from any requests made by Mr. Dixon-Clarke to Mr Malcolm for a breakdown of the bank balance in the management accounts, no one at Harvey Bowring sought information about what funds were in HMU's client account. No request was made to see bank statements.

104. Because of poor results from HMU's underwriting, Harvey Bowring decided against giving them a further binding authority for a period beginning 1 January 1997, when the second binding authority was due to expire. Instead, they asked for further information about the underwriting, and agreed to the series of extensions to the second binding authority to which I have referred. According to Mr Andrews, Harvey Bowring agreed to the extensions in the hope that a profitable business could be salvaged, encouraged by reports that it was hoped that there might be found a buyer of HMU; but these hopes had evaporated by early June 1997.

105. On 15 January 1997 Mr. Dixon-Clarke resigned as a director of HMU. His evidence is that he felt that he had tried hard to carry out his director's duties properly, but was frustrated by HMU's other directors in his attempts properly to inform himself about the business.

106. By the time that Mr Dixon-Clarke resigned as a director, it had become apparent that HMU were unable to reimburse the overpaid commission. I have already explained that the claimants agreed to defer repayment. The underwriters required security by way of a charge over the assets of HMU. Harvey Bowring learned that (i) the shares in HM Network were not owned by HMU but by certain Jersey Trusts through a nominee, and (ii) that a 60% shareholding in Finex Inc., an American credit insurance company to whom HMU had advanced funds to finance the development of business

there, was held by HM Jersey and not by HMU. Mr Andrews considered that this was contrary to the agreement of 28 February 1995, and also contrary to assurances given by Messrs Hilton and Malcolm that such interests would be held "downstream" of HMU. Accordingly, the claimants required charges over the assets of HM Network and HM Jersey, as well as those of HMU.

107. Whilst the security documentation was being drawn up, in late 1996 or January 1997 Mr Andrews learned that Coutts had a prior charge over HMU's assets, but according to his evidence he did not realise that it covered funds in the client account. I accept that evidence in as far as he meant that he did not turn his mind to what precisely might have been covered by the charge.

108. By January 1997 Harvey Bowring had received complaints from two policyholders, RDM Factors Limited and Emblem Design Limited, that claims had not been paid. (Mr Ventiroso said that Harvey Bowring learned of these complaints on 5 February 1997, but he must be mistaken: Harvey Bowring knew of them earlier.) Mr Beadle wrote to Mr. Andrews on 5 February 1997 explaining how these claims were being handled, but because of the serious nature of the complaints, Mr Ventiroso decided to meet Mr Beadle to discuss them, and on 11 February 1997 he wrote to HMU, asking them to prepare a chronological review of the claims and to recommend changes to the claims handling procedures for the future.

109. In this letter Mr Ventiroso said that he would like to review the reporting procedures under the binding authority agreement. He drew the attention of HMU specifically to section 22-24 of the wording, and invited Mr Beadle's comments. In a reply dated 21 February 1997 Mr Beadle reviewed these sections in some detail, but of section 22k he simply wrote "no comment". This response did not surprise Mr Ventiroso, and he did not pursue enquiries about whether or how HMU were complying with this obligation. I consider that there was no reason that Mr Ventiroso should have done so, given the nature and purpose of these exchanges.

110. There were further discussions about claims handling between HMU and Harvey Bowring, in particular Mr Ventiroso, and during the first half of 1997 Harvey Bowring carried out a series of claims reviews. It suffices to say that, although Mr Ventiroso thought that a good rapport had been built up with HMU's claims department, he also saw evidence that in some cases HMU's senior management were overriding the decisions of their claims department. Harvey Bowring's concerns were aggravated when they heard in June 1997 that Mr Hilton had removed a number of files from HMU's offices in circumstances that suggested that the relationship between Mr Malcolm and Mr Hilton had broken down. At Mr Keeling's request, Mr Andrews and Mr Ventiroso undertook a review of the binding authority. Harvey Bowring were concerned that cash flow management was affecting the payment of claims. Mr Andrews had learned the balance in the client account, and it seemed to him less than the bordereaux indicated that it should have been.

111. Against this background, in late June 1997 Harvey Bowring appointed Norman Reitman Company Inc ("Norman Reitman") to carry out an audit of HMU. In their

letter of instruction dated 24 June 1997 Norman Reitman were specifically asked to concentrate upon the "IBA account in order to ensure that this has solely been used for insurance related transactions and that there has been no intermingling of funds for other purposes i.e. bonus payments/loans to Directors etc."; and "to carry out a reconciliation of the accounts processed through to the binding authority" for the periods 21 November 1994 to 31 December 1995 and 1 January 1996 to 30 June 1997.

112. Mr. Bruno Deani of Norman Reitman presented his first report on 9 July 1997. He concluded that HMU had not been operating a segregated "IBA" in accordance with the binding authority, that the client account was not a trust account, and that the client account and HMU's general account with Coutts were effectively operated as one account. He said that the majority of transactions passing through the client account were receipts of premium and automatic transfers to HMU's general account under the sweeper arrangement; and that as at 30 June 1997 the balance in the client account should have been £1,860,521.

113. Harvey Bowring's response to this report was to write to HMU on 11 July 1997 terminating the binding authority. They also wrote letters asking the principal producing brokers to pay future premiums to Carpenter Bowring rather than HMU, and instructing Carpenter Bowring to open a designated account to receive them. Carpenter Bowring did so, and they also took over the handling of claims. Since then the claimants have, through Carpenter Bowring, paid all claims, brokerage, reinsurance premiums and other expenses in respect of policies written under the binding authorities.

114. After the underwriters had terminated HMU's binding authority, Mr Deani was instructed to prepare a further report, following up the issues raised in his first report and carrying out reconciliations of the bordereaux accounts for the second quarter of 1997, of the payments and receipts subsequent to 30 June 1997 and of the current bank balances. In a report dated 26 August 1997, following a further audit of HMU, Norman Reitman concluded that as at 20 August 1997 the balance in the client account should have been £2,261,930. It was in fact only £557,207, a deficit of £1,704,723. Norman Reitman also reported that between February 1996 and July 1997 a total of £11,371,468.71 had been transferred out of the account to the general account under the sweeper arrangement.

The claimants' case on reliance and loss

115. When Mr. Flaux made his final submissions, the claimants' case was that, had Harvey Bowring not received the assurance contained in the undated letter, they would have terminated the binding authority in August 1995. He also submitted that the letter continued to influence Harvey Bowring at the end of the year, and that but for it the claimants would not have subscribed to the second binding authority. Further, the claimants said that if, when the sweeper arrangement was introduced at about the beginning of February 1996, Harvey Bowring had been told of it, the claimants would then have terminated the second binding authority. Coutts dispute that the claimants

ever relied upon the undated letter at all, and deny that any negligence on their part caused loss. At this stage, however, I simply record how before and during the trial the claimants' case on reliance and resultant loss developed.

116. In their pleaded case the claimants put forward the case that, when they terminated the binding authority in 1997, there should have been £2,261,930 in the client account, whereas in fact the balance was only £557,207, which sum Coutts used to reduce what HMU owed them; and they claimed damages in the sum of £2,261,930. That is to say, their case assumed that, but for Coutts' breach of duty, the binding authorities would have been conducted until July 1997 with any sums relating to the underwriting held in a discrete account against which Coutts could have no claim by way of charge or set-off or otherwise. The sum of £2,261,930 was calculated by Norman Reitman in their report dated 26 August 1997, in which they assumed that the bordereaux accounts up to and including those for the first quarter of 1997 had been duly settled, and made a calculation of how much should have been received (principally by way of premiums) and how much had properly been paid (principally by way of claims) during the second quarter of 1997 and thereafter.

117. However, Mr. Andrews' first witness statement, which was dated 24 May 2002, did not support this case. He said that if Coutts had not provided the undated letter or some comparable assurance, then he would have pressed for "documentation showing that the account had been opened. If HMU had not provided satisfactory independent confirmation that a segregated fiduciary account had been opened, I would have terminated the Binding Authority by issuing 30 days cancellation notice in accordance with Binding Authority wording."

118. In response to the claimants' pleaded case, Coutts served a report dated 31 March 2003 from Mr. David Lee of Messrs Lee and Allan, a chartered accountant. He demonstrated that, if HMU had had to set aside the underwriting funds so that they were not available for HMU's other requirements, they would not have been able to continue in business without an injection of further funds. Mr. Campbell, the claimant's expert accountant, agreed with this, and calculated that HMU would have required some £800,000 to £1 million by way of further funding. Mr. Lee put the amount rather higher. The difference between them is not important.

119. In a witness statement dated 16 April 2003, about 2 weeks before the trial started, Mr. Andrews commented upon this. He expressed the belief that, given that syndicates had already invested time and money in HMU, "the underwriters' preference would have been to provide the necessary funding to enable HMU to continue with the binding authorities. I would expect this to have been by way of input of additional share capital by the three shareholder syndicates". Mr Doughty also gave evidence that he believed that in these circumstances his syndicate would have offered financial support to HMU. However, when the claimants' case was opened, it was put on the basis that all the additional finance would have been provided by Murray Lawrence.

120. In his report dated 31 March 2003 Mr Lee calculated the financial impact of the underwriting written under the binding authorities between 21 November 1994 and 11

July 1997, and compared it with the results only of the policies underwritten before 9 August 1995. (In this report, he dealt only with the August 1995 complaint and not the February 1996 complaint.) Mr Lee concluded that the total sum actually lost by the claimants through the underwriting under the binding authorities was £1,390,554, and if the first binding authority had been terminated on 9 August 1995, the loss would have been £2,149,664. At 9 August 1995 there was (as Mr Lee calculated from HMU's bank account nominal ledger) a balance of £862,741 then in HMU's bank accounts.

121. These calculations were made by assessing the premium income net of commission payments and brokerage, and then estimating a "net loss before investment returns" by taking from the net premium an amount representing claims and other expenditure, including loss adjusting expenses, reinsurance premiums and "bad debt". The bad debt figure was assessed on the basis that it was the difference between (a) the amounts set out in the bordereaux as due to the claimants and (b) the actual amount received by the claimants: Mr Lee took the period 1 April 1997 to 11 July 1997 in order to estimate the claimants' actual loss, and the period from 1 April 1995 to 9 August 1995 in order to estimate what their loss would have been if the binding authority had been terminated on 9 August 1995. He then added to the net loss before investment returns a sum representing the reduction in investment returns, to obtain a figure for the "net loss after investment returns".

122. In making these calculations, Mr Lee was considering the position as at 31 March 2002, and he brought into account "investment returns" that he calculated would have been earned to 31 March 2002 by the syndicates on the assumption that underwriters would have earned returns from any invested funds at the same rate as their other investments.

123. Mr Lee's calculations produced the following results. Leaving the bank balance of £862,741 out of account, the claimants' loss from giving HMU underwriting authority, had it been terminated on 9 August 1995, would have been £2,149,664: that is to say, £759,110 more than the loss of £1,390,544 that they in fact incurred. On this basis, the claimants suffered no loss (indeed, they profited) from continuing the underwriting authority after August 1995. If the sum of £862,741 be supposed to have been paid to the claimants upon termination of the underwriting authority at 9 August 1995, then Mr Lee's calculations indicated that the claimants' loss was aggravated as a result of the underwriting authority continuing after 9 August 1995: that they would have incurred a loss of only £955,547 had it been terminated, and so their loss increased by £434,997 thereafter.

124. In response to Mr Lee's report (and following a hearing before Mr Justice Thomas at which understandably he expressed concern about the position regarding the expert accounting evidence), the claimants served a report from Mr Campbell dated 16 April 2003. This was Mr Campbell's first report. He rightly observed that Mr Lee was not assessing the quantum of the claimants' claim, but their overall trading and investment loss upon different assumptions; and he considered the financial consequences if the claimants, having learned of HMU's banking arrangements in

August 1995, had continued HMU's underwriting authority with (as Mr Campbell put it) "a fiduciary account being operated properly" – which was then the claimants' primary case.

125. Mr Campbell agreed that Mr Lee's general approach could be adopted to calculate the claim on the basis that the underwriting authority had been terminated on 9 August 1995. However, he made a number of criticisms of Mr Lee's calculations. I do not need to refer to them all because many of them have been resolved in discussions between the accountants. However, (i) Mr Campbell observed that, since the run off continued after 31 March 2002, the calculation would need to be brought up to date; and (ii) he pointed out that Mr Lee took no account of expenses incurred by the underwriters in relation to the binding authorities. He said that such expenses would include "brokerage, binding authority audit costs, a reasonable allocation of syndicate expenses and appropriate syndicate reinsurance costs".

126. When Mr Flaux opened the claimants' case on 30 April 2003, the accounting experts had produced neither a Joint Statement nor reports relating to the February 1996 complaint. Mr Flaux said that the primary case was the August 1995 complaint, which he presented on the basis that if the claimants had discovered the position about the Coutts accounts in August 1995, they would have insisted that HMU operated an account which fully protected the underwriting funds, and that HMU would have continued underwriting accordingly. He said that position about the February 1996 complaint would be explained "in due course", but that because the sweeper arrangement was introduced "at a relatively early stage of development", financially it made little difference whether the position was considered at August 1995 or February 1996.

127. When Mr. Andrews was cross-examined, it became apparent that he had neither any responsibility for any decision that Murray Lawrence might have made to invest in HMU, nor the knowledge properly to express any opinion about what investment (if any) Murray Lawrence might have made. Moreover, he accepted that in his opinion, if HMU needed additional finance as Mr Campbell and Mr Lee contemplated, Murray Lawrence might have made a further investment of something in the order of their earlier investment, which was a little less than £125,000. His evidence did not support the case that the underwriters would have provided the necessary finance alone or, indeed, collectively. Mr. Doughty's oral evidence was that DP Mann might have doubled their investment of some £94,000 in HMU, but he too, in my judgment, was not in a position to give evidence about what investments DP Mann might have made. The case that the syndicates would have provided the amount of finance identified by the accountants was not made out. Indeed, it is difficult to understand how it came to be advanced.

128. Accordingly, the claimants were forced in their final submissions to abandon what had been opened as their primary case about how the undated letter caused them loss. Instead they put forward a case on the basis that, had they learned the true position, they would have terminated the first binding authority in August 1995, and would not have entered into the second binding authority.

129. In the meanwhile, on 8 May 2003 Mr Lee and Mr Campbell produced a Joint Statement, which dealt with the August 1995 complaint on the basis that the authority was terminated. They reached a large measure of agreement in calculating what the financial consequences of this would have been, but they still disagreed about whether there should be brought into account a figure representing underwriters' expenses. (They also had not resolved whether, as Mr Lee suggested, certain creditors of HMU would have been regarded as preferential creditors had HMU been wound up in August 1995. However in his closing submissions, Mr Malek made it clear that Coutts were content to proceed on the basis that the creditors were not preferential.) Mr Campbell calculated that the loss resulting from HMU's underwriting continuing after 9 August 1995 was £1,699,691, and Mr Lee calculated that it was £49,563, the difference being attributable to the underwriters' expenses question. Their agreed calculations, like those originally made by Mr Lee, included "bad debt" figures: £1,887,187 for bad debt for the period from 1 April 1997 to 11 July 1997 and £843,141 for the period from 1 April 1995 to 9 August 1995.

130. On 15 May 2003, Mr Campbell and Mr Lee made a joint statement setting out comparable calculations in relation to the February 1996 complaint. Mr Campbell calculated that the loss resulting from HMU's underwriting continuing after 2 February 1996 was £116,082, and Mr Lee calculated that there would not have been any loss at all. The "bad debt" figure for the period to 2 February 1996 was £1,601,153.

131. In their closing submissions, therefore, the claimants put forward the following case about their loss resulting from the August 1995 complaint: that if HMU had maintained a proper client account, there would have been £1,887,187 in that account on 11 July 1997 - £1,887,187 being the amount that Mr Campbell and Mr Lee agree to be the "bad debt" due from HMU to the underwriters in respect of the period 1 April 1997 to 11 July 1997; that the amount of the "bad debt" on 9 August 1995 was £1,084,141; and that accordingly the claimants' loss was £803,046, subject to any credit that is to be given in respect of trading gains. The comparable calculation for the February 1996 complaint was that their loss was £286,034.

132. The implication of this submission was, as Mr Flaux observed, that the bulk of the loss had been incurred relatively soon after the undated letter. The contrary suggestion made in the claimants' opening was abandoned. However, there had been no assessment of what losses resulted from underwriting under the first binding authority and what losses related to the second binding authority. I asked that this be considered. It seemed to me important for at least three reasons: first, it might have been arguable that Coutts owed a duty of care to the underwriters on the first binding authority, but not to those on the second binding authority. Secondly, Coutts (citing Banque Bruxelles SA v Eagle Star, [1997] AC 191) were submitting that, even if the losses had been shown to have been incurred by the claimants and in fact caused because the binding authorities were not determined in August 1995 or, as the case might be, February 1996, nevertheless the losses were not of such a kind, or had not been shown to be of such a kind, as to be recoverable. Thirdly, the question when the loss was suffered is relevant to Coutts' contentions that the damage was caused wholly or partly by the claimants' own fault.

133. Before Mr Flaux replied to Coutts' closing submissions, the trial (which had overrun its estimated length) had to be adjourned over the vacation from 22 May 2002 to 4 June 2002. During that period, Mr Campbell and Mr Lee made a further joint statement, setting out their calculations of the losses suffered by each of the syndicates subscribing to each of the binding authorities. They made their calculations of the position (i) on the basis of the approach which in their closing submissions the claimants had said was the correct approach, a comparison of the "bad debt" position in July 1997 with that in August 1995 or February 1996 ("the claimants' approach"); (ii) on the basis of the approach originally adopted by Mr Lee but taking Mr Campbell's view of underwriters' expenses ("Mr Campbell's approach"); and (iii) on the basis of the approach adopted by Mr Lee and disregarding underwriters' expenses ("Mr Lee's approach"). Whichever approach was adopted, Mr Campbell and Mr Lee agreed that there was no loss incurred under the first binding authority, and that any losses were incurred by those subscribing to the second binding authority as a result of them doing so.

134. I do not need to set out the losses of each syndicate. The figures calculated by Mr Campbell and Mr Lee for the losses in respect of the second binding authority were as follows:

i) In respect of the August 1995 complaint, assuming that the first binding authority would have been terminated in August 1995 and so the second binding authority never subscribed:

On the claimants' approach: loss of £1,850,524.

On Mr Campbell's approach: loss of £1,918,333.

On Mr Lee's approach: loss of £664,289.

ii) In respect of the February 1996:

On the claimants' approach: loss of £1,839,754.

On Mr Campbell's approach: loss of £2,140,856.

On Mr Lee's approach: £1,027,792.

135. In light of this joint statement, in his closing submissions in reply Mr Flaux abandoned the claim by the underwriters in their capacity as subscribers to the first binding authority. He confined the claim to one on behalf of the subscribers to the second binding authority. His contention in relation to the August 1995 complaint was that the loss was £1,850,524, and in relation to the February 1996 complaint that

it was £1,839,754. The increase in the total claim is, of course, attributable (overwhelmingly if not entirely) to the fact that, while claiming losses from underwriting under the second binding authority, the underwriters do not give credit for profits from underwriting under the first binding authority after 9 August 1995.

136. The claimants did not seek to prove when during the term of the second binding authority the loss was suffered. There is no evidence whether it was suffered before or after it was extended beyond 31 December 1996.

Witnesses

137. The claimants called eight witnesses to give evidence: five worked for Harvey Bowring, namely Messrs Andrews, Dixon-Clarke, Keeling, Shipley and Ventiroso; two were from the following market, namely Mr Doughty of syndicate 435 and Mr Grant of syndicate 991; and the eighth was Mr Deani of Norman Reitman. They also put in evidence statements by eight other representatives of following syndicates, whom Coutts did not wish to cross-examine. Coutts called two witnesses, Mr Mallett and Mr Stubbs.

138. Mr Malek submitted that I should regard Messrs Andrews, Dixon-Clarke, Keeling and Doughty as unreliable witnesses. He did not so criticise the evidence of Messrs Shipley, Ventiroso, Grant and Deani, and I regard these latter four as straightforward and reliable witnesses, albeit their evidence was relatively unimportant.

139. Before coming to Mr Malek's specific criticisms of the other four witnesses, it is convenient to mention two more general points made by Mr Malek. The first concerned the affidavits that had been made by Messrs Andrews, Dixon-Clarke and Keeling in the DTI proceedings. Coutts submitted that these witnesses' evidence in the DTI proceedings and in this trial is irreconcilable, and that if their evidence in this case is correct, their evidence in the DTI proceedings – specifically about reliance on the undated letter - was, at best, incomplete and, potentially, misleading. It was also said that the affidavits are more likely to be reliable than the evidence in this case.

140. The context in which these affidavits were made was this. The Official Receiver relied upon Mr Hilton's letter of 20 July 1995 in support of the allegation that Mr Hilton and Mr Malcolm were in breach of fiduciary duty in allowing money in the client account to be used for HMU's own purposes. In response, Mr Hilton said that the undated letter "superseded" his letter of 20 July. The affidavits from Messrs Andrews, Dixon-Clarke and Keeling were served, inter alia, in response to what Mr Hilton said.

141. Mr Keeling deposed that Harvey Bowring relied upon the letter of 20 July. More significantly, with reference to what Mr Hilton said about the undated letter, Mr Keeling said this: "... I confirm that I have no recollection of receiving the letter dated 9 August 1995 from Mr Mallett. The requirement to operate a fiduciary account was

not waived and following the correspondence in July 1995 we were led to believe that a fiduciary account was set up and maintained, as required." When cross-examined by Mr Malek about this, I understood Mr Keeling's explanation for this passage in his affidavit to be that Harvey Bowring were relying upon both HMU and Coutts.

142. In his affidavit, Mr Andrews did not directly refer to Mr Hilton's evidence that the undated letter superseded his letter of 20 July 1995, but he did say that, "we were led to believe by the advice contained in the letter to Mr Keeling dated 20 July 1995 from Mr Hilton that a separate account had been established". He did not refer to the undated letter, or indeed to Coutts. He acknowledged in cross-examination that there was no suggestion in his affidavit that he or Harvey Bowring hesitated to rely upon what they were told by HMU. He also said that he had seen Mr Keeling's affidavit either in draft or in its final form, and that he considered it correct "as far as it went".

143. Mr Dixon-Clarke said in his affidavit that he was aware of the letter of 20 July 1995, and that he was shown the undated letter by Mr Beadle and took a copy of it. He said that the undated letter was not sent directly to Harvey Bowring, but "nevertheless I still believed that such an account was set up since it was a condition of the binder and of Lloyd's". Coutts pointed out that in his witness-statement in this case, on the other hand, Mr Dixon-Clarke said that the "only thing I felt I could rely on" was Coutts' assertion that a client account had been set up. For reasons that I shall explain, Mr Dixon-Clarke was not cross-examined about this.

144. Mr Malek submitted that, since these affidavits were sworn in November 2000, the recollection of the witnesses about what Harvey Bowring were relying on in July and August 1995 has "migrated", and that the undated letter has assumed in their minds an importance that it did not have at the time. I consider that Coutts are justified in their submission that the thrust of the evidence in these affidavits is that Harvey Bowring were relying upon the assurances that they were given by HMU, and in particular upon the letter of 20 July 1995, rather than upon anything written by Coutts; and that for this reason I should be cautious in accepting the evidence that Harvey Bowring placed significant reliance upon the undated letter.

145. Mr Malek's second general criticism of the important witnesses called by the claimants is that their witness statements proved to be unreliable in important respects, and covered matters about which the witness could not properly give evidence. Again, I consider that these criticisms are justified. Two examples of the latter criticism will suffice.

i) First, Mr Keeling's witness statement, under the heading "Renewal", referred to meetings with HMU leading to Harvey Bowring writing the second binding authority, and described his recollection of HMU's response of 19 December 1996 to Harvey Bowring's list of "renewal requirements". In cross-examination he acknowledged that he had no recollection of these matters, saying of the letter of 19 December 1995, "I have no recollection of seeing the letter and I am just thinking whether I was actually involved in the renewal, although I cannot remember to be honest".

ii) As I have mentioned, both Mr Andrews and Mr Doughty expressed views in their witness statement about what the reaction would have been had HMU's financial position in August 1995 become known, and in particular stated that Harvey Bowring and D P Mann would have made further investments. It became quite clear in the course of their cross-examination that they had no proper basis for giving this evidence.

146. Mr Andrews was the first witness to give evidence. He was a vital witness for the claimants because their case on reliance depended upon his evidence. He was cross-examined for more than two days. I recognise that he was often being asked detailed questions about matters that happened some five to eight years ago, and make due allowance for the danger of a witness becoming confused in the course of so long a cross-examination. I reject any suggestion of deliberate dishonesty on the part of Mr Andrews. Nevertheless, I did not find him a satisfactory witness, and I have hesitated to accept his evidence unless it was supported by another witness or by documentary evidence. In his witness statements he had subscribed to statements that were contradicted by his oral evidence, and on some matters I considered his evidence so improbable as to be incredible. I have already referred to a tension between his evidence and the affidavits served in the DTI proceedings, and my reservations about his witness statements. I illustrate my assessment of his evidence with the following examples.

i) First, he gave evidence that, before he entered into the first binding authority, he had been assured by Carpenter Bowring that the separate account was "in place". I cannot accept that. That evidence had not been foreshadowed in any of the witness statements, and no document supports it. It is most unlikely that the account would have been opened before the binding authority was subscribed, and I find it impossible to believe that, if such an assurance had been given, Harvey Bowring would not have raised it with Carpenter Bowring in July and August 1995 when they learned that it was untrue.

ii) Secondly, Mr Andrews made inconsistent and contradictory statements about how Harvey Bowring would have reacted had they not seen the undated letter. These inconsistencies have not been properly explained.

iii) Thirdly, when asked in cross-examination about the first Whittington report, Mr Andrews said that he had a meeting with Whittington at which it was explained by Harvey Bowring that initially HMU had not had a separate account for underwriting funds, but that the position had been rectified. (At one point Mr Andrews even seemed to be suggesting that the undated letter had been mentioned to Whittington, but he resiled from this.) I cannot accept that evidence. Again the evidence was not foreshadowed in any witness statement, and no document reflects such a meeting. Had such a conversation taken place, it would, in my judgment, have been reflected in the second Whittington report.

147. I do not doubt that Mr Keeling was seeking to assist the court when he gave evidence. However, he had little direct involvement with the binding authorities, and I do not consider that his evidence was always reliable.

148. Mr Dixon-Clarke's evidence took an unfortunate course. After he had been cross-examined for something over two hours, he collapsed in the witness box, and was not well enough to continue his evidence. Coutts were therefore unable to cross-examine him on a number of important parts of his witness statements, upon which he would certainly have faced some probing questioning. Before he fell ill, Mr Dixon-Clarke had faced cross-examination that made me doubt about his reliability as a witness. For example,

i) He had said in his first witness statement that the money in a separate account would be for the benefit of policyholders. In his second statement, he asserted that it belonged to underwriters. He was unable to explain this inconsistency.

ii) He was asked about a passage in his witness statement in which he stated that he had been shown the undated letter by Mr Beadle, and that "it was attached to a letter from Coutts & Co, which I did not see at the time but have subsequently been shown in connection with this litigation". In cross-examination, he seemed to be saying that he had seen the accompanying letter in August 1995. It remains a mystery what he was referring to in his witness statement.

149. Mr Doughty gave his evidence in a forceful manner. At times he seemed more concerned to argue the claimants' case than to give evidence of fact. I conclude that he allowed his enthusiasm for the claimants' case to colour his recollection. I have already explained why I reject his evidence about discussion on 19 July 1995 about obtaining independent confirmation that a separate account had been opened, and also his evidence that he was shown a copy of the undated letter in August 1995.

150. I therefore conclude that the defendants' submission that I should be cautious about accepting the evidence of these witnesses is well founded.

151. Mr Flaux submitted that the evidence of Mr Mallett and Mr Stubbs under cross-examination was inconsistent with their witness statements, and that their witness statements, having been drafted for them, did not reflect the witnesses' perception of the relevant events; and that therefore I should treat the witness statements of Mr Mallett and Mr Stubbs with some scepticism.

152. I do not accept that submission. It is certainly the case that in the course of his (perfectly proper, indeed skilful) cross-examination, Mr Flaux prevailed upon the witnesses, in particular Mr Mallett, to accept propositions (sometimes propositions touching upon questions of law, and certainly involving questions of judgment) which assisted the claimants' case, and which they had not acknowledged in their witness

statements. That is very different from concluding their statements did not reflect their true views when they made them. Indeed, there were occasions when Mr Mallett seemed to me too readily to agree with what was put to him by Mr Flaux, and to accept criticism of what he had done. Examples are some of his evidence, to which I have referred, when asked whether he should have advised the underwriters about the sweeper arrangement when it was introduced, and how it would have affected his thinking if he had seen the terms of the binding authorities. Both Mr Mallett and Mr Stubbs seemed to me honest and candid witnesses, and I have generally accepted their evidence.

Issues

153. The claimants having abandoned any claim in respect of the first binding authority, the only claim that I need consider is that made by the claimants in their capacity as subscribers to the second binding authority. They say that, but for the negligent misrepresentations made in the undated letter, they would not have subscribed to it, and also that, had they been told of the sweeper arrangements introduced in February 1996, they would have determined it. The live issues between the parties can, I think, be formulated as follows:

i) Whether the undated letter contained any false or misleading statement.

ii) Whether, in providing the undated letter, Coutts owed any relevant duty to the underwriters subscribing to the second binding authority.

iii) If the answer to i) and ii) is yes, whether Coutts were in breach of their duty.

iv) Whether any such false or misleading statement caused the claimants to subscribe to the second binding authority.

v) Whether Coutts owed any duty to those subscribing to the second binding authority to advise them of the sweeper arrangement. If they did, Coutts do not contend that they did so advise the underwriters.

vi) How, if at all, was the claimants' conduct affected by the fact that Coutts did not inform them about the sweeper arrangement?

vii) If Coutts' breach of duty caused the claimants to subscribe, or to continue to subscribe, to the second binding authority, whether (subject to viii below) that caused any losses for which the claimants are entitled to be compensated.

viii) Whether the claimants' own fault caused their loss either wholly or partly.

Were HMU obliged to create a Trust Account?

154. Before considering these issues, I first deal with a difference between the parties about what obligations HMU had in relation to underwriting monies. The claimants do not allege that they had any beneficial interest in the client account or any other funds held by Coutts, and they accept that, from the time that the account was opened, any funds in it were subject to the debenture of 5 April 1995. They do, however, allege that on the proper interpretation of their arrangements with HMU, HMU were obliged to create an account for receipts from underwriting and to hold the funds in it upon trust. In my judgment the claim does not depend upon the answer to this question, and its significance is the less since the claimants have abandoned their contention that, but for Coutts' breach of duty, the binding authorities would have been operated from August 1995 in accordance with the requirement of clause 22k and the equivalent provision in the slip agreement for the second binding authority. (For convenience, I shall refer only to clause 22k.) However, since this question has been the subject of argument during the trial, I shall state my conclusions.

155. HMU were writing insurance policies as the claimants' agents. Prima facie when they received premiums from insureds, they received them as the agent of the claimants and held them to the claimants' use. However, the status of the funds in the client account depends upon the effect of the term of the agreement between HMU and the underwriters set out in clause 22k.

156. The account referred to in clause 22k was to have the following characteristics:

i) It was to be a "fiduciary" account.

ii) It was to be a separate account "in respect of all business hereunder", that is to say, upon a strict reading, in respect of business under the first binding authority or, as the case might be, the second binding authority respectively. (In fact, the claimants do not complain that there were not separate accounts for the two authorities, and they never contemplated that there should be.)

iii) It was to be operated in the manner of an IBA as used by a registered Insurance Broker.

157. Clause 30 required HMU to have one separate account for receipts from all insurance transactions, and did not stipulate that it be a fiduciary account or one operated in the manner of an IBA. To the extent that clause 30 conflicted with clause 22k, clause 22k would, in my judgment, prevail, first because it was a typed clause whereas clause 30 was printed, and secondly because the agreement issued by LPSO is to be interpreted together with the slip (which contained the wording of clause 22k). However, the wording and heading of clause 30 specifically referred to bank accounts, and so a question arises whether on the proper interpretation of the binding authority clause 30 is to be taken to define HMU's obligations in respect of bank accounts and clause 22k

to define their obligations with regard to their own accounting records. I understand Mr. Hilton's letter of 20 July 1995, in which he refers to a "memorandum account", to suggest this. I conclude, however, that this interpretation would give clause 22k little or no commercial point, and I interpret clause 22k as referring to a bank account. It is not remarkable that in an agreement of this kind there were two different, and not entirely consistent, provisions dealing with what bank accounts HMU were to maintain.

158. Both parties rely upon the requirement that the account be maintained in the manner of an "IBA". The reference to an IBA was a reference to an insurance broking account, which registered insurance brokers were required to maintain under the Insurance Brokers Registration Council (Accounts and Business Requirements) Rules Approval Order 1979 (the "IBA Rules"). The IBA Rules require registered insurance brokers to maintain a designated Insurance Broking Account ("IBA") to be operated in accordance with the Rules. These requirements include the following:

i) All moneys received by the brokers which relate to insurance transactions are to be paid into the account (Rule 6(3)).

ii) All payments to insurers and insured must be paid out of the IBA, and no other account (Rule 6(4)).

iii) The account can also be used to pay brokerage and for other specified purposes, but not for any unspecified purpose (Rule 6(5)).

iv) No charge or encumbrance over the account, or right of set-off or lien relating to the funds in the account, is permitted; and no charge or encumbrance is permitted over sums due from assureds (Rule 6(10)).

v) The broker is required to obtain written acknowledgement from the bank that an IBA has been opened in order to comply with the rules, and that the bank is not entitled to enter a charge, encumbrance, right of set-off or lien over the funds in the account (Rule 6(2)).

159. In In re Multi Guarantee Company Ltd. (No 2), (unreported, 31 July 1984) Harman J considered whether funds in an account operated in accordance with these rules were held on trust. Having considered the nature of a trust account, he concluded, "In my judgment, it is quite impossible to read these rules as creating trusts and requiring the application of ordinary trust principles to these accounts". Accordingly, in "The Law of Reinsurance in England and Bermuda" (O'Neil and Woloniecki, 1998) the authors conclude (at para. 11-05), "Nothing in the rules governing the use of IBAs and IBA assets suggests the relationship between a Lloyd's broker and reinsureds (or reinsurers) is anything other than that of debtor and creditor". They also observe (at para. 11-06) that, "Non-Lloyd brokers also have to keep separate insurance broking accounts but although restrictions are placed on the use of the moneys in the account,

again nothing says that it is a trust account and it was held not to be so by Harman J. in re Multi Guarantee Company Ltd.".

160. I agree with Harman J's decision and the reasons that he gave for it, which I need not repeat. The requirement that the account be maintained "in the manner an IBA Account" does not of itself mean that the account is to be a trust account. This, however, does not mean that clause 22k, interpreted as a whole, does not require HMU to create and operate a trust account, and is not conclusive as to whether the parties agreed (expressly or by implication) that the monies in the account should be held in trust, and whether the court would have imposed upon HMU the obligations of a trustee because it would have been improper for them to benefit from the money. If the parties did enter into an agreement for a trust account, there would be no difficulty in giving effect to it: see, for example, Stephen Travel International Pty Ltd v Qantas Airways Ltd, (1988) 13 NSWLR 331.

161. In support of their argument that the agreement provided for a trust account, the claimants referred to the understanding of the agreement that Messrs Andrews and Dixon-Clarke said that they had. That evidence is not a legitimate aid to interpreting the agreement.

162. The argument that the parties expressly agreed to create a trust account depends upon the description of the account as a fiduciary account. However, "fiduciary" is not a term which distinctly connotes trusteeship, and, in my judgment, the reference in clause 22k to a "fiduciary account" does not distinctly indicate an intention that the chose in action that the account represents should be held on trust. "The relationship of trustee and beneficiary is but one of the relationships generally described as fiduciary": Snell's Equity (30th Ed) para 6-05. I decline to infer from the use of the word "fiduciary" an express agreement that a trust was to be created, and there is no basis for an implication of such a requirement.

163. Was the nature of the account such that the law would have considered HMU subject to the obligations of a constructive trustee? Unlike the case of In re Multi Guarantee Co Ltd (No 2) (in which the IBA was not dedicated to funds associated with one scheme), clause 22k provided for an account to be used only in connection with the binding authority. This enables the claimants to rely upon the statement of Channell J in Henry v Hammond, [1913] 2 KB 515 at p.521: "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is the cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent amount of money, then, in my opinion, he is not a trustee of the money, but merely a debtor."

164. I am not persuaded that the principle applies here. It was never intended that the claimants should be entitled to receive all the monies in the separate account. It was to be used to pay claims, premium tax, brokerage, reinsurance premiums and for

various other purposes. The entitlement of the claimants was only to be paid what was due to them under quarterly bordereaux. In these circumstances, I agree with Coutts' submission that the relevant principle is stated in Finn on Fiduciary Obligations (1977) at para 225, citing King v Hutton, (1900) 83 LT 68 by way of illustration: "The most compelling indicator for or against a trusteeship of an agent's receipts is the nature of the account agreed to be kept by the agent with his principal. If, after each individual transaction or group of related transactions he effects for his principal, he is to pay over the proceeds in his hands – minus any commission payable – then he will ordinarily be a trustee. But where an agent is effecting both sales and purchases for his principal, or is discharging liabilities for his principal out of monies received, and he keeps a running account with periodic settlement dates at which he pays over the balance of account (if any), he will, ordinarily, be a debtor only – the debtor-only conclusion being reinforced if there are present in the accounts (1) set offs, other than for commission, or (2) interest charges on credits and debits".

165. I conclude that the binding authorities did not, upon their true interpretation, require HMU to maintain an account in which they held the underwriting monies on trust.

Did the undated letter contain any false or misleading statement?

166. The undated letter described the account that had been opened as a "client account", and said that the account "would contain, at any given date, the balance of premiums less claims due to the underwriters in accordance with the bordereaux accounts". The claimants say that the letter was reasonably to be interpreted as meaning that, when the letter was written, the account was a client account in what they call the true sense of the term. They also say that the letter meant that the account would be operated as a true client account in the future, so that they could reasonably expect to be informed by Coutts if the account ceased to be a client account or ceased to be operated as one. Accordingly, they contend that it is implicit in the letter, first, that the funds in the client account were and would be kept entirely separate from HMU's own funds; and, secondly, that Coutts did not have, and would not have, rights of charge or set-off over the moneys in the account.

167. I do not consider that the undated letter can properly be interpreted as a representation by Coutts about what funds would be held in the account at any time in the future, or the source of those funds, or an unqualified statement that the balance in the account would reflect the bordereaux accounts. Coutts could not be expected to know any of these things, and they expressly stated that HMU had complete authority to operate the account. On the face of it, a bank writing such a letter would not be expected to make representations about how the customer would conduct the account. I do not think that a reasonable reader of the letter would interpret it as a representation by Coutts about how HMU would be using the account at any given time thereafter. In my judgment, the question whether the letter misrepresented the nature and status of the account depends upon the description of the account as a "client account", and what that connotes in the context of this letter.

168. The parties presented written evidence from banking experts about the meaning of the term "client account". The claimants' witness was Mr Stephen Hiscock, who has been involved in banking since 1973. Coutts adduced a report by Mr Stewart White, who started in banking in 1964. Both were well qualified to give expert banking evidence, and in view of the measure of agreement between them it was unnecessary for them to give oral evidence. It suffices to set out Mr White's statement of the position: "Client accounts are governed by Client Money rules that require segmentation of money between principal and client. That is, they are bank accounts used by professional practitioners (e.g. solicitors) to hold money on behalf of (i.e. that belongs to) clients. For example, money held for clients by solicitors must be kept separate from the solicitors' personal and office accounts… There can be no set-off between different client accounts or between client accounts and those of the principal's personal or office accounts".

169. I accept this statement. It is in accordance with answers given in cross-examination by Coutts' own witnesses of fact. Mr Mallett agreed, as a general proposition, that a client account will have the following features: (i) that the monies in it will be kept separate from the account holder's general or office funds; (ii) that the bank will have no right of set-off or charge over it; and (iii) that normally the account should not become overdrawn.

170. Although the expert evidence is of interest, in my judgment it is of limited assistance. After all, the undated letter was not written by one banker to another, but by a banker to underwriters at the request of HMU. The essential question is not how the letter would be interpreted within banking circles, but – if and in so far as it is necessary to give an objective meaning to the meaning of the letter - how it would reasonably be understood in wider financial circles.

171. For my part, I would not be prepared to conclude that, in the context of the undated letter, the term "client account" has an unambiguous meaning so as definitively to connote an account with the features described by Mr White and acknowledged by Mr Mallett, or that it has any unambiguous meaning. But I do not consider that this necessarily provides Coutts with an answer to the claim. If Coutts, in breach of a duty of care, wrote an ambiguous or unclear letter that the reader, or at any rate the addressee reading it, reasonably misunderstood to mean that the account had those features, that might, in appropriate circumstances, give rise to a claim in negligence. Was the undated letter misleading about the client account in this sense? I consider this by reference to the typical features of a client account acknowledged by Mr Mallett.

172. I find elusive the suggestion that the letter was misleading because it connoted that the monies on the account would be separate from HMU's office funds. In one sense, funds in any account might be said to be separate from funds in another account. In so far as this feature is reflected in the claimants' pleaded case, it is in the allegation that the undated letter impliedly represented that "the funds standing to the credit of the account would be used exclusively for transactions relating to the Binding Authorities". For reasons that I have already explained, I cannot accept that the

undated letter could reasonably be interpreted as stating how funds in the account would be used by HMU.

173. Nor does the third feature of a client account acknowledged by Mr Mallett seem to me in point, or to relate to any part of the claimants' complaint. The client account never was overdrawn.

174. The second feature was that the bank should not have rights of charge or set-off over funds in the account. It does seem to me that, in the circumstances of this case, the unqualified use of the term "client account" in the undated letter might reasonably convey to the addressee reading it that the funds in the account were not then subject to any right of set-off or charge.

175. Was the undated letter therefore misleading? In October 1997 Coutts did use the funds in the client account to set-off against HMU's debts on other accounts, but that does necessarily mean that they were entitled to do so, still less that they would have been entitled to do so in August 1995. Nor is it in point that, as I have concluded, the first binding authority did not, upon the proper interpretation of clause 22k, require HMU to open a trust account. As HMU knew, Coutts had not seen the binding authority, and its provisions did not alter the terms of the relationship between Coutts and HMU.

176. If in normal circumstances a customer requests a bank to open a client account, and the bank agrees to do so, prima facie the bank would not, in my judgment, have any right to use funds in the account to set-off against debit balances on other accounts of the customer, and any debenture that the bank might have over the customer's assets would not cover funds in the client account. However, I do not need to decide that because in this case the arrangements for the client account were discussed between Ms Hollingsworth and Coutts before it was opened, and she explained that its purpose was simply administrative and to enable the underwriters to see the underwriting activities. I consider that, in these circumstances, the designation of the account as a client account was not to be understood as between Coutts and HMU to import an agreement that the debenture should not cover the funds in the client account or Coutts' rights of set-off between HMU's accounts should not apply to it.

177. I conclude that the arrangement between HMU and Coutts was that Coutts' debenture and their rights of set-off were to cover funds in the client account, and therefore the unqualified reference to a client account in the undated letter was potentially misleading.

Did Coutts owe any relevant duty of care when providing the undated letter?

178. I shall consider in due course whether Harvey Bowring relied in any way upon the undated letter and what it said. If they did not do so, the claim fails and the question whether any duty of care was owed by Coutts in providing it is of no significance.

However, it is convenient first to assume the requisite reliance and to assume that the reliance was reasonable, and consider on this basis whether Coutts owed any relevant duty of care in providing the undated letter.

179. A decision whether a duty of care exists requires consideration of its scope. As Lord Bridge said in Caparo v Dickman, [1990] 2 AC 605 at p.627D, "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless". Here the question is whether in providing the undated letter Coutts owed any duty of care to those who might (and eventually did) subscribe to a second binding authority for HMU (either renewing the first binding authority or as a new subscriber) in relation to their decision whether or not so to subscribe.

180. I present the question in these terms although (ignoring the inevitable change in the membership of syndicates who renewed the underwriting authority) most of the syndicates subscribing to the second binding authority had also subscribed to the first binding authority. Even if a duty of care were owed by Coutts to the subscribers to the first binding authority, the scope of that duty could not extend beyond their protection from any loss suffered in that capacity. As subscribers to the second binding authority, they stand in no different position from the syndicates who then gave HMU underwriting authority for the first time (just as, in the case of an auditor's duties, a purchaser of additional shares was said in Caparo v Dickman to be in the same position as any other investor: see [1990] AC 605 at p.627E/F per Lord Bridge).

181. Reflecting the need to define the scope of the duty, the authorities emphasise the importance of considering the purpose of the statement, when deciding whether the maker of a statement owed a duty of care to a claimant. Bingham LJ recognised the connection between the purpose of the statement and the transaction said to have resulted from reliance upon it in Reeman v Dept of Transport, [1997] PNLR 618 at p.639-640: "The cases show that before a plaintiff can recover compensation for financial loss caused by negligent mis-statement his claim must meet a number of conditions. Among these are three particularly relevant here. The statement must be plaintiff-specific: that is, it must be given to the actual plaintiff or to a member of a group, identifiable at the time the statement is made, to which the actual plaintiff belongs. Secondly, the statement must be purpose-specific: the statement must be made for the very purpose for which the actual plaintiff has used it. Thirdly, and perhaps overlapping with the second condition, the statement must be transaction-specific: the statement must be made with reference to the very transaction into which the plaintiff has entered in reliance on it."

182. These principles are now established beyond dispute. In Caparo v Dickman (loc cit) both Lord Bridge (at p. 624C-F) and Lord Oliver (at pp. 644C-645A) cited with approval the judgment of Richmond P in Scott Group v McFarlane [1978] 1 NZLR 553 at p 566: "I do not think that such a [special] relationship should be found to exist unless, at least, the maker of the statement was, or ought to have been, aware that his advice or information would in fact be made available to and be relied on by a particular person or class of persons for the purposes of a particular transaction or type

of transaction. I would especially emphasise that to my mind it does not seem reasonable to attribute an assumption of responsibility unless the maker of the statement ought in all the circumstances, both in preparing himself for what he said and in saying it, to have directed his mind, and to have been able to direct his mind, to some particular and specific purpose for which he was aware that his advice or information would be relied on". In Berg Sons v Adams, [1993] BCLC 1045 at pp.1068,1069, Hobhouse J said of Caparo, "The speeches of both Lord Bridge and Lord Oliver analysed the criteria necessary for the existence of a duty of care. They both concluded that the criteria included the identification of a transaction which it could be said was the purpose (or, possibly, a purpose) of the giving of the advice or the making of the statement and the foreseeability that the advice or statement would be relied upon (maybe, relied upon without independent enquiry) in relation to that transaction."

183. While the test whether these requirements are fulfilled is an objective one, necessarily it must be answered by reference to what was, or ought to have been, within the parties knowledge: see, for example, McInerny v Lloyds Bank, [1974] 1 Ll L R 246 at p.255 per Megaw LJ.

184. Harvey Bowring and the other claimants did not specify that HMU should provide confirmation of their letter of 20 July 1995 by way of a letter from their bank. They had no communication of any kind with Coutts either before or after the undated letter was provided by Coutts, and did not seek any letter from them. Still less did they let Coutts know the purpose for which they might require a letter from them. Indeed, there is no evidence that I accept that Harvey Bowring had it in mind at any relevant time that HMU's letter of 20 July 1995 should be confirmed by their bank or any other third party; still less that Harvey Bowring sought such confirmation in order to decide whether or not to continue HMU's authority to underwrite on their behalf; still less in order to decide whether to give them a further, or renewed, binding authority.

185. The only document indicating why Harvey Bowring wished for any form of verification of what HMU had told them is Mr Andrews' letter of 24 July 1995. Mr Andrews told me that this was Harvey Bowring's only request, written or oral, for verification of any kind. In it Mr Andrews simply asked for "all relevant documentation", and it was said to be sought (i) to complete Harvey Bowring's files and (ii) to confirm to Lloyd's that the IBA requirement was being met. It remains a mystery quite what was in Mr Andrews' mind: when the letter was produced, no copy was taken by Mr Andrews for Harvey Bowring's files, and no letter from Coutts was required for Lloyd's regulatory purposes. However, there was no suggestion in Mr Andrews' letter either that documentation was requested in order that Harvey Bowring could be satisfied that they should continue HMU's underwriting authority, or that a letter should be written by a third party in response to the request.

186. As far as Mr Keeling was concerned, he was not looking for verification of HMU's letter from anyone independent from HMU, but simply to have some assurance from someone other than Mr Hilton, whom HMU trusted less than Mr Malcolm. There is no reason to suppose that he was not satisfied after the meeting on 4 August 1995.

187. From the point of view of Coutts, they were never given any written explanation for HMU's request for a letter to the underwriters. In cross-examination Mr Mallett gave the following evidence about the oral explanation that they were given:

"Q. Well, you appreciated that they were going to rely upon it, did you not?

A: The understanding that I had at the time was that they could show their trading business separate to their office and expenses.

Q: Answer my question if you can. You appreciated at the time that, quite independently of what arrangements you might have with your customer, HMU, your customer was asking you to write a letter addressed to the Lloyd's syndicates saying that there was a client account and that certain monies would be in the client account. Correct?

A: Yes.

Q: You must have appreciated from reading the draft that you were being asked to write that this was a letter which was going to be seen by Lloyd's Underwriters, coming from Coutts Bank, a reputable financial institution – correct?

A: Yes.

Q: - an independent financial institution?

A: Yes.

Q: Independent from HMU?

A: Yes.

Q: And that Lloyd's Underwriters would read it and rely upon what you said in it?

A: I recognised they would read it. What they rely on it for, I do not know."

His evidence continued:

"Q: And you certainly did not think that this letter was simply going to be put into a drawer or something of that kind, did you? You did think that it was going to be shown to the underwriters?

A: I just thought it was going to show them they had a separate account for their trading activity.

Q: That they had a client account?

A: Yes."

188. I did not understand Mr Mallett in his last answer to be saying that he thought that the purpose of the letter was to tell underwriters that the account had all the features typical of a client account. More importantly, I am satisfied that Mr Mallett, and Coutts, knew no more of the purpose of the undated letter than is acknowledged in these answers. As he put it in his covering letter of 9 August 1995 (which Mr Dixon-Clarke read), Mr Mallett did not appreciate the "finer points of detail behind [HMU's] request". He knew that the letter was to be shown to underwriters as a statement from a reputable financial institution that HMU had set up a separate account to keep underwriting monies separate from their general office funds. He did not understand that the letter might be relied upon by underwriters to decide whether to continue to subscribe to the first binding authority or to renew it.

189. In reaching this conclusion, I have not overlooked that in his witness statement Mr Stubbs said that he understood that the "purpose of the letter was that it was to be provided to the leading underwriter, Harvey Bowring, *at their request*" (emphasis added). When he was asked about this, it was clear that he in fact had no understanding as to whether or not the request originated from Harvey Bowring.

190. I also do not think that Mr Mallett or Coutts ought to have known or understood more than they did. It was not suggested to Mr Mallett in cross-examination that he should have done. Even if he had made further enquiry of HMU, the claimants could hardly suggest that Coutts should or would have learned anything other than what Mr Andrews wrote in the letter of 24 July 1995. After all, HMU had been told nothing other than this. It cannot be argued that Coutts should have known that the claimants wished to verify what HMU had told them when the claimants themselves had not disclosed this wish to HMU. I add that, although Mr Mallett was pressed to acknowledge that he was at fault in failing to obtain the terms of the first binding authority from HMU, Coutts would not have learned from them why the undated letter was requested by HMU.

191. How then do the claimants put the case that they were owed a duty of care by Coutts? They submit:

i) That Coutts knew the relationship between HMU and the claimants, and that HMU held funds that were to be paid to the claimants. This is true as far as the claimants who subscribed to the first binding authority are concerned.

ii) That, when they wrote the undated letter, Coutts knew that HMU had asked them to open a client account and to provide written confirmation to underwriters that they had done so; and that the new account, though designated a client account, was not (as I have concluded) to have all the features typical of a client account. Again, the observation is true, but I add that the confirmation was directed to underwriters subscribing to the first binding authority.

iii) That Mr Mallett appreciated that the request for the letter was an unusual one and was made in order to provide the claimants with independent confirmation that a client account had been opened and was being operated by HMU. As I have explained, I do not consider Mr Mallett knew, or is to be taken as having known, precisely why this independent confirmation was required. Subject to this, I accept this observation of the claimants so far as the underwriters who subscribed to the first binding authority are concerned.

iv) That the very care with which Mr Mallett chose the wording of his letter and amended the draft provided by HMU shows that he assumed responsibility for the accuracy of the contents. I do not accept that the fact that a writer takes care over the contents of a letter demonstrates that he considered himself to owe a duty of care or that he did in fact do so; still less does this observation indicate the scope of any duty of care, or to whom it was owed.

192. I can understand how these observations might support an argument that Coutts owed a duty of care to the subscribers to the first binding authority, although they provide no answer to the fundamental problem facing the claimants that Coutts did not know, and could not have been expected to know, that the undated letter might be relied upon by underwriters in deciding whether to continue or extend HMU's underwriting authority. I am not persuaded that Coutts owed a duty of care to the claimants as subscribers to the first binding authority, but I do not need to decide this. None of the claimants' observations provide any real argument that Coutts owed a duty of care to the relevant persons or to the claimants in their relevant capacity (that is to say, to underwriters, or potential underwriters, subscribing to the second binding authority), in respect of the relevant decision or transaction (the decision to subscribe to the second binding authority) or for the relevant purpose (to decide whether to confer or continue to confer underwriting authority on HMU). After all, the undated letter itself refers to "the Lloyd's Syndicates participating in Hilton Malcolm Underwriting Limited's binding authority at Lloyd's", that is to say the first binding authority. It does not refer to, or allude to, the second binding authority.

193. I conclude that, in writing the undated letter and providing it to HMU, Coutts were not assuming any responsibility to the claimants in relation to a decision to continue or to terminate HMU's underwriting agency, and, in my judgment, they were certainly not

assuming any such responsibility in relation to the underwriters' decision to subscribe to the second binding authority by way of renewal or otherwise. The claimants have not established a duty of care in relation to the August 1995 complaint.

Were Coutts in breach of a duty of care when they wrote and provided to HMU the undated letter?

194. The criticism of Coutts for writing the undated letter and providing it to HMU can, I think, be stated in its simplest form as follows: they described the account as a client account without explaining or indicating that it did not have what Mr Mallett acknowledged in cross-examination to be essential characteristics of a client account in that the Bank had rights of set-off or charge over the funds in the account. They did not consider that the client account to be excluded from their charge and rights of set-off because of the explanation given to them by HMU as to its purpose, namely that it was being opened for administrative and presentational purposes in order to keep the underwriting business separate from their office expenses. Coutts did not know the terms of the binder, and therefore did not know whether or not this arrangement was consistent with the agreement between HMU and the underwriters, and Mr Mallett accepted that, had he seen the first binding authority, he would have written a "very different" letter: he would have considered (i) that HMU were required to hold all monies relating to the underwriting in a fiduciary account, (ii) that that account was to be operated in the manner of an IBA, (iii) that the monies were to be kept separate from HMU's funds and (iv) that the bank would not have any rights of charge or set-off over the funds in the fiduciary account.

195. Mr Mallett accepted in cross-examination that the use of the term "client account" in the undated letter without any qualification or explanation was misleading, and that with hindsight he considered that he should have made the status of the account clearer in his letter. His explanation was that at the time he did not appreciate the implications that the term might be understood to have. He looked upon the term "client account" as identifying the funds or the account that the letter referred to, rather than as a statement about their legal status, and he thought that the letter would simply show the underwriters that HMU "had a separate account for their trading activity". He also said that when he wrote of funds being held "for the syndicates" in the covering letter, he simply meant that those monies were due to the syndicates. He thought that Coutts did have rights of set-off and charge over the funds in the client account, but had not taken, and never took, legal advice about this, accepting what Mr Beadle said in view of his background with Wilde Sapte, a firm whom Coutts frequently instructed.

196. I have some sympathy for Mr Mallett's position. It is easy in hindsight to see how his letter might be misunderstood, but that does not necessarily mean that he wanted proper skill and care when he wrote it. However, he accepted the description "client account" did not truly reflect what the account actually was or what he understood Coutts rights over funds in the account to be. I am driven to conclude that, if Coutts had owed the underwriters subscribing to the second binding authority a relevant duty of care, they would have been in breach of it.

Did any such false or misleading statement cause the claimants to subscribe to the second binding authority?

197. This issue raises three questions:

i) Did Harvey Bowring rely upon statements in the undated letter and therefore decide not to terminate the first binding authority?

ii) Did Harvey Bowring rely upon statements in the undated letter when they subscribed to the second binding authority, and in reliance thereon decide to subscribe to it?

iii) In light of the answers to questions i) and ii), have the claimants established a sufficient causative relationship between statements in the undated letter and their subscription to the second binding authority to support their claim.

198. In questions i) and ii), I have referred only to Harvey Bowring because Mr Flaux made it clear that, although Mr Doughty's evidence was that he saw the undated letter, the claimants do not advance any argument of reliance on the basis of that. I can properly summarise the evidence of the underwriters of the rest of the following market on the first binding authority (who made witness statements upon which they were not cross-examined) as being that they subscribed to it because they were following the lead of Harvey Bowring, and, as I infer, they would have followed any decision of Harvey Bowring to terminate it. They were: Mr Jeremy Venton of syndicate 376; Mr Ralph Bailey of syndicate 138; Mr Michael Meacock of syndicate 727; Mr Clifford Palmer of syndicate 314; Mr George Lloyd-Roberts of syndicate 55; Mr Neil Maidment of syndicate 623; Mr Michael Gravett of St Paul's Syndicate Management.

199. A claimant usually proves that a negligent misstatement caused him damage by showing that he relied upon it. The nature of the reliance that must be demonstrated was examined by Rix J in Avon Insurance plc v Swire Fraser Ltd., [2000] CLC 665. Although Avon Insurance was a claim for damages under section 2(1) of the Misrepresentation Act 1967, Rix J considered the judgments of the Court of Appeal in JEB Fasteners Ltd v Marks Bloom & Co., [1983] 1 AER 583, a case in which damages for professional negligence were claimed, including this passage from the judgment of Stephenson LJ (at p.589a): "...as long as the misrepresentation plays a real and substantial part, though not by itself as decisive part, in inducing the plaintiff to act, it is a cause of his loss and he relies on it, no matter how strong or how many are the other matters which play their part in inducing him to act...". From his analysis of the judgments, Rix J (at para 18) drew a distinction between a factor which is observed or considered by a plaintiff, or even supports or encourages his decision, and a factor which is sufficiently important to be called a real and substantial part of what induced him to enter into a transaction. The latter can establish a causative link between a negligent misstatement and loss, but the former will not do so.

200. The claimants submitted that in order to bring a claim for negligent misstatement it is not necessary to show that the statement was the only reason for their conduct, and it suffices that the representation was an effective consideration or cause of their conduct; and that it is nothing to the point that there were other considerations influencing the decision of equal or greater significance. They cite the decision of the Court of Appeal in Assicuriazioni Generali v Arab Insurance Group, [2002] EWCA 1642, [2003] Lloyd's IR 131, in which Ward LJ said this (at para 215): "I take the law to be this: if it be established that the representee did not allow the representation to affect his judgment in any way then he could not make it a ground for relief. If on the other hand the representee relied on the misrepresentation, then the representor cannot defeat his claim for relief by showing that there were other more weighty causes which contributed to his decision to enter into the contract. In this field the Court does not allow an examination of the relative importance of contributory causes. In other words, it is sufficient if the representation is *a* cause even if it is not *the* cause operating on the mind of the representee when he enters into the contract". See too at para 78 in Clarke LJ's judgment.

201. I do not consider that there is anything in the judgments in Assicurazioni Generali that is inconsistent with the distinction identified by Rix J, and certainly there is nothing in those judgments which prevents me from observing the distinction in this case. This much is clear from the following: at paragraph 59 of his judgment, Clarke LJ said that, "the true position is that the misrepresentation must be an effective cause of the particular insurer or reinsurer entering into the contract but need not of course be the sole cause. If the insurer would have entered into the contract on the same terms in any event, the representation or non-disclosure will not, however material, be an effective cause of the making of the contract and the insurer or reinsurer will not be entitled to avoid the contract". Commenting upon this, Ward LJ (who dissented in part, but on the facts and not upon any point of legal principle) said (at para 218), "I am happy to express my agreement with the analysis of the law conducted by Clarke LJ subject to this reservation. I am not entirely sure that it is necessary to require that the representation be an *effective* cause of the party's entering into the contract on the terms on which he did. If by that qualification my Lord means no more than that it did actually play upon his mind and influence his decision then I have no argument. In other words I readily accept that it must have some causative effect. I would be concerned if the insistence on an effective cause were to lead to an evaluation of the weight placed by the representee upon the various matters which in combination lead to the agreement. We must be careful not to be led back into the error that the cause has to be a decisive cause".

202. I have found that Mr Andrews and Mr Dixon-Clarke saw the undated letter. I have also found that Mr Andrews told Mr Keeling that he had "seen something from Coutts". The claimants' case that Harvey Bowring relied upon the letter depends upon whether Mr Andrews did so. Mr Keeling's evidence goes no further than his recollection of Mr Andrews' mentioning the letter to him. There is no evidence that Mr Dixon-Clarke relied upon the undated letter or anything that it said, and in any case he was not in a position to make any relevant decision about the binding authority. In his witness statement, he simply said that, "Having received this assurance from Coutts & Co that a separate client account would be maintained, I felt

confident that the Binding Authority could continue and the terms of the authority and the slip would be met".

203. In his first witness statement Mr Andrews said that he understood 'client account' to mean that "the account would be a fiduciary account in which HMU's clients' (i.e. the underwriters' and insureds') funds would be kept separate from HMU's general business funds. I also understood that any funds in the account would be used only for transactions relating to the binding authority". He also said that it did not occur to him "that Coutts might have charges or rights of security over an account which they described as a "Client Account", or that they would be willing to allow HMU to operate an automatic sweeper from a Client Account to HMU's own business account". In this statement, he said that if HMU had not provided "satisfactory independent confirmation that a segregated fiduciary account had been opened", he would have terminated the first binding authority.

204. The evidence set out in Mr Andrews' fourth witness statement, dated 3 May 2003, after the trial had started, was this: that when he saw the undated letter, he noticed that it was headed "client account" and that a client account was referred to in the body of the letter. "The letter made clear that the account would contain premiums due and claims payable specifically relating to the Binding Authority. After considering the letter and observing these terms I believed that Coutts & Co were setting up a segregated fiduciary account, indeed a client account". He also said in that statement that he "understood the Coutts' letter to be confirming that a segregated trust account had been opened and that it would be used to keep premiums and claims separate from HMU's own funds".

205. No documentary evidence supports the claimants' case that Mr Andrews, or anyone at Harvey Bowring, attached any significance to the undated letter. It is not referred to in any contemporary document disclosed by them. Mr Andrews' letter of 24 July 1995 does not suggest that Harvey Bowring were not content to rely upon the letter of 20 July 1995 from HMU, expressing concern only to complete their file and to satisfy Lloyd's. I have already referred to the evidence of Messrs Andrews, Dixon-Clarke and Keeling in the DTI proceedings.

206. Mr Andrews' answers in cross-examination support Coutts' submission that in August 1995 he did not play close attention to the wording of the undated letter, and he did not attach to it the importance that his witness statements might suggest. He described his reaction when shown the letter thus: "I am sure it was just a case of: well, that is good news. Next broker, please". His explanation for not keeping a copy of the letter was "that at the time I would not have considered it important". When he was asked how important the letter was when he received it, he answered "...it had a relevance. It was nice to receive something that could put my mind at rest that what we had previously been let down over, but what Mr Hilton had previously told Mr Keeling, here we were with a reputable source – giving us confirmation that this account was now in place".

207. I have already explained that I regard Mr Andrews' evidence with caution. I do not accept that, but for the undated letter, Harvey Bowring would have decided to terminate the first binding authority or that he relied on it in the sense that it played any real part, or substantial part, in any decision that he made. Indeed, I do not accept that it played any part at all in any decision made by Harvey Bowring. I am also unable to accept that, when Mr Andrews read the undated letter, it conveyed to him all that his witness statements say. Specifically, I am not persuaded that Mr Andrews understood from the reference in the undated letter to a client account that Coutts had no rights of set-off or charge over any funds in the account, or that this understanding led Harvey Bowring not to terminate the first binding authority.

208. The claimants also submit that Mr Andrews was still relying on the undated letter in December 1995 when he decided to subscribe to the second binding authority. Mr Andrews did not give evidence that the undated letter played any part in his thinking when he made this decision. There is no reason to think that he did have it in mind. In my judgment, it would have been unreasonable of him to have been relying upon the letter in December 1995 in order to make a decision of this kind without further reference to Coutts.

209. There is a further difficulty facing the claimants. Since they have not sought to prove whether their loss was suffered before or after the second binding authority was extended beyond 31 December 1996, they have not shown whether the loss resulted from their original decision to subscribe to the second binding authority, or from their subsequent decisions to extend it. Nor have they shown that Harvey Bowring or any of the underwriters were relying on the undated letter when they agreed to the extensions. This question was not explored during the trial either in evidence or in submissions. In view of the repeated changes in the claimants' case on how and when they suffered their loss I would have little sympathy with the claimants if they argued that the point was not open to Coutts. However, in view of my conclusions on other issues, I need say no more about this.

210. In view of these conclusions, the claimants' case that the undated letter caused them loss fails. However, I should state how I would have viewed the question of causation had I concluded that Mr Andrews had relied upon the wording in the undated letter in August 1995 and in reliance thereon decided not to end the first binding authority.

211. I accept the evidence of the following market that they were relying upon Harvey Bowring, and if Harvey Bowring had terminated the first binding authority, they too would have done so. I also accept that if the first binding authority had been terminated in these circumstances, the second binding authority would not have been given.

212. Mr Malek submitted that in order to establish a claim for damages for economic loss resulting from negligent misstatement, it is necessary for the claimants to demonstrate reliance on the negligent misstatement. He cited Merrett v Babb, [2001] QB 1174 at p.1192, where May LJ said, "If the damage is what has been characterised as foreseeable economic loss, there may be a problem, - the more so if what causes the

loss is the giving of advice or the providing of information. In such cases especially – but, I think, in every case – reliance is an intrinsically necessary ingredient which appears in every formulation of a test".

213. The question therefore arose whether, as far as the claim by the following market is concerned, there would have been the requisite reliance if I had accepted that Mr Andrews relied upon what Coutts said in the undated letter, so as to support a claim by the Harvey Bowring syndicate. Mr Flaux submitted that Harvey Bowring are to be regarded as the agents of the following market, and so the following market would, in those circumstances, properly be regarded as relying upon what Coutts said. For my part, I regard it as unnecessary and artificial so to resort to arguments based on agency. The reason that reliance is sometimes said to be a necessary ingredient in claims of this kind, is because "otherwise the negligence will have no causative effect": Henderson v Merrett, [1995] 2 AC 145, 180F per Lord Goff. It does not follow that the reliance must necessarily be that of the claimant. For example, if a testator relied upon negligent advice of a solicitor, it might suffice to found a claim by disappointed beneficiaries. See too Ministry of Housing and Local Government v Sharp, [1970] QB 223 and Caparo v Dickman, (cit sup) at p.636E per Lord Oliver. Of course, if a claimant did not himself rely upon the negligent misstatement, that might well be relevant to the question whether he was owed a duty of care. It also might, on the facts of the particular case, mean that he was unable to establish a sufficiently proximate causal connection between the breach of duty and his loss to support his claim. However, in this case, as far as the first binding authority is concerned, if the requisite reliance on the part of Harvey Bowring had been established, I would have considered it sufficient to support a claim by the following market.

214. With regard to the second binding authority, Mr Flaux's primary argument was that the statements in the undated letter continued to influence Harvey Bowring in their decision to subscribe to the second binding authority (and so through Harvey Bowring's agency, to influence the following market). I have rejected that argument. However, if I had held that Coutts owed a relevant duty of care and if I had accepted that Harvey Bowring did not determine the first binding authority because they had been misled by the undated letter, then I would have concluded that the claimants had established a sufficient causative connection between Coutts' breach of duty and the decision to subscribe to the second binding authority.

Did Coutts owe the claimants who subscribed to the second binding authority any duty of care to advise them about the sweeper arrangement?

215. The claimants allege that, having provided the undated letter, Coutts were under a duty to them to inform them if, to their knowledge, the client account was not operated "as a client account properly so called", and specifically to inform them when the sweeper arrangement was introduced. When the case was opened, the February 1996 complaint was very much a secondary argument, and when parties were making their closing submissions, the claimants' case is that their losses had, overwhelmingly if not entirely, been suffered before the sweeper arrangement was introduced. Mr Flaux therefore dealt with this part of the case only briefly, and

understandably Mr Malek responded accordingly. In these circumstances, I too shall deal with it briefly.

216. The claimants' argument that Coutts owed them a duty to disclose to them the sweeper arrangement is that the implication of the undated letter was that there would be no such arrangement for transfers from the client account. There seem to me at least three major difficulties this argument:

i) First, the claimants presented the February 1996 complaint as the "logical extension" of the complaint of misstatement in the undated letter. However, I have concluded that in writing and providing to HMU the undated letter Coutts owed no duty of care to those subscribing to the second binding authority in that capacity. I cannot accept in these circumstances that they owed them a duty to correct any misunderstanding that the undated letter might have given them.

ii) Secondly, I have concluded that, properly understood, the undated letter said nothing about how the client account would be used in the future. It specifically stated that the operation of the account was within the "complete authority" of HMU. I therefore do not think that the undated letter created any impression that had to be corrected when the sweeper arrangement was made.

iii) Thirdly, the claimants have not defined the scope of the duty that they allege, in terms of when Coutts were obliged to disclose an arrangement made with HMU or a mandate received from them. The claimants do not suggest that all transfers of funds between HMU's client account and their general account should have been disclosed. They do not suggest that they would have any complaint if each of the transfers in fact made under the sweeper arrangement had been mandated by HMU under a specific instruction rather than a continuing arrangement. The complaint is, as I understand it, that the duty of disclosure arose because of the nature of the instructions that HMU gave Coutts, rather than because of the transfers of funds made under them.

217. I conclude that Coutts owed no duty to advise the claimants of the sweeper arrangement.

218. I add that in support of their case that Coutts were in breach of duty in not advising the underwriters when the sweeper arrangement was introduced, the claimants relied upon evidence given by Mr Mallett in cross-examination that he should have insisted on seeing the terms of the (first) binding authority, for example before Coutts extended HMU's overdraft arrangements and granted the facility for £750,000 in December 1995. I do not find this argument convincing. Mr Mallett (and, indeed, Mr Stubbs) did indeed accept that Coutts should have seen the binding authority, but not, as I understood the evidence, because of any duty owed to the claimants, but because a prudent bank would have done so in order to protect themselves.

How, if at all, was the conduct of the claimants affected by the fact that Coutts did not inform them about the sweeper arrangement?

219. The claimants' contention is that, if they had been informed of the sweeper arrangement, they would have terminated the second binding authority with immediate effect. Coutts dispute this. They submitted that the claimants, and in particular Harvey Bowring, never sought any sort of continuing assurance from Coutts, and never looked to Coutts for any information after they received the undated letter. They referred to the evidence of Mr Andrews that he did not think when he read the undated letter that it provided more than what he had sought in his letter of 24 July 1995, that is to say documentation verifying that the account had been opened.

220. Accordingly, Mr Malek argued that the claimants have failed to show that they were relying on any continuing assurance in the undated letter, still less any assurance relevant to the sweeper arrangement. If Harvey Bowring, or any of the claimants, had been still relying upon the undated letter in February 1996, it would have been unreasonable of them. This in itself, it was submitted, defeats the February 1996 complaint.

221. I accept this submission. In doing so, I do not overlook the evidence of Mr Andrews that because the undated letter gave no date when the account would be closed, he considered that it was still being maintained at least five months after the letter, when the second binding authority was given. I was not persuaded either that Mr Andrews attached that meaning to the letter when he saw it or that thereafter he continued to rely upon the undated letter.

222. Moreover, on Mr Andrews' own evidence he appreciated that HMU had complete authority to operate the account. He said, "It was for HMU to put in and take monies out, but it was not for Coutts to draw monies off – to sweep monies off the account". As I have found, the sweeper arrangement did not come about because Coutts had taken it upon themselves to draw money off the client account, but because HMU had given instructions for transfers to be made. As I interpret his evidence, this was in accordance with what Mr Andrews understood from the undated letter HMU had authority to do.

223. However, there is another argument that this alleged negligence on the part of Coutts has not been shown to have prevented the early termination of the second binding authority. It is by no means probable that if they had learned of the sweeper arrangement Harvey Bowring, or any other claimant, would have ended HMU's underwriting authority. Their most natural response to the news, if they were at all concerned about it, would have been to raise the matter with HMU. Had they done so, HMU might have persuaded them to accept the arrangement. If Harvey Bowring would not accept it and no other compromise could be agreed, it seems to me much more likely that HMU would have abandoned the sweeper arrangement rather than have their underwriting authority terminated, not least because (as the claimants do not dispute) HMU were always free to instruct Coutts from time to time to transfer specific amounts from the client account to the general account as and when they

needed to do so. There is no evidence that Harvey Bowring would have terminated HMU's underwriting authority in these circumstances. More generally, there is no evidence that I accept that Harvey Bowring would in any event have decided to terminate HMU's underwriting authority because of the sweeper arrangement.

If Coutts' breach of duty caused the claimants to continue HMU's underwriting authority, did that cause any loss for which the claimants are entitled to be compensated?

224. I have explained how the claimants' case has evolved into one that their loss is to be measured by comparing the "bad debt" as at 11 July 1997 with the bad debt as at 9 August 1995 or 2 February 1996. In this calculation neither underwriting profits nor investment returns are brought into account. As the claimants' case is presented, the loss is to be calculated simply by comparing the "bad debt" actually borne by the claimants with what would have been borne by them had the second binding authority not been subscribed or, for the February 1996 complaint, had it been terminated on 2 February 1996.

225. The claimants' submission, therefore, is that trading profits are not to be brought into account to reduce the measure of their loss indicated by the increased "bad debt". They say that trading profits are res inter alios acta; that they are irrelevant to the duty owed by Coutts to them, and so irrelevant to the calculation of any damages resulting from breach of that duty; and that, just as any trading losses would not be recoverable, so any trading profits are not to be brought into account.

226. I am unable to accept the claimants' argument that their damage should be calculated by comparing the "bad debts". The "bad debt" in July 1997 represented what the claimants say was due to them from HMU because HMU had underwritten policies for them, had received premiums on their behalf, and failed to make payment to the claimants accordingly. Whether those policies were profitable or not depends upon what, if any, claims were made under them, but once they formulate the claim in this way, the claimants themselves include in it their profits from underwriting the policies.

227. This, it seems to me, shows both the flaw in the claimants' argument that trading profits are res inter alios acta, or collateral to the loss for which they seek damages, and that the "bad debt" approach is not a proper measure of loss resulting from HMU's underwriting authority continuing until July 1997. The purpose of damages is to put the claimants in the position in which they would have been if HMU had no such authority after 9 August 1995, or, as the case may be, 2 February 1996. Their loss is not premiums from the policies underwritten in their name for which HMU did not pay them. If HMU had not been underwriting for them, the claimants would not have received the premiums. Their losses resulting from the underwriting are from claims made under the policies. However, the claimants necessarily accept that they cannot properly seek compensation for paying claims without recognising premiums that they received; they do not seek as damages the gross amount of claims paid by them under the policies. Thus, any proper method of calculating damages necessarily reflects underwriting profits in as much as it reflects both the premiums paid to HMU

for cover that, on the claimants' case, would not have been written but for Coutts' negligence, and the claims made under those policies.

228. I understand this is the point which Mr Campbell made in his report of 16 April 2003 to which I have referred: that if it be supposed that, but for Coutts breach of duty, HMU's underwriting for the claimants would have ceased, the damages must be assessed by reference to what policies would not then have been written.

229. I add only two points:

i) I do not understand Mr Flaux to be advancing a separate argument in respect of the treatment of "investment returns" by the accountant experts. Had the claim succeeded, I would have invited further submissions to clarify this point, but in view of my other conclusions I have not needed to do so.

ii) I reject the claimants' argument that because they could not have recovered underwriting losses, they should not give credit for underwriting profits. As Lord Hoffmann put it in Banque Bruxelles SA v Eagle Star, (cit sup) at p.218B, "There is no contradiction in the asymmetry": it simply reflects the fact that the claimants must prove both their loss and the fact that the loss fell within the scope of the defendant's duty.

230. It is convenient next to consider whether the claimants are justified in submitting that account should be taken of what Mr Campbell called underwriters' expenses. Coutts do not dispute that there should be brought into the calculation of damages any expenditure which the claimants show was incurred by them because HMU continued to have underwriting authority, and would not have been incurred had the underwriting authority been terminated. The dispute between the parties is whether on the evidence the claimants have shown that there were such expenses, and if so their amount.

231. Mr Campbell's calculation proceeds on the basis that underwriters' expenses would have been 6% of the gross premium receipts. He made it clear that this was an assumed figure chosen simply because the binding authorities calculated profit commission on the basis that underwriters' expenses were 10%, against which he allowed 3% for Carpenter Bowring's brokerage and 1% for reinsurance costs.

232. The case that underwriters' expenses were 6% of the gross premium depends upon evidence of Mr Andrews and Mr Doughty. They said that in their experience, the allowance made in binding authorities for underwriters' expenses could vary between 5% and 20% of gross premiums, and that the agreement in the HMU binding authorities reflected a reasonable expectation of the level of expenses. Apart from brokerage and reinsurance costs, they described the expenses as being "a share of the general overheads of running the entire operation of each syndicate participating in the Binding Authority", including the cost of providing underwriting capital, the cost of

servicing the business, Lloyd's levies and other charges and "where applicable, taxes". When they were cross-examined about this evidence, it became apparent that neither Mr Andrews not Mr Doughty had any real knowledge of what was intended to be covered by such provisions in binding authorities, and were not in a position to say whether or not the expenses were incurred specifically in relation to the binding authority and would have been saved if the binding authority was terminated.

233. The claimants put before me no evidence that I can accept as to the level of underwriting expenses specifically associated with the binding authorities, or which should properly be brought into account in assessing the consequences of HMU's underwriting authority continuing until July 1997. I conclude that the claimants have not established the factual basis for the underwriting expenses brought into account by Mr Campbell and that Mr Lee's figures are to be preferred.

234. Coutts have a further argument. It is based upon the principle stated as follows by Lord Hoffmann in the Banque Bruxelle, (cit sup) at p.211A-B, G-H: "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled to compensation for loss, it is necessary to decide for what sort of loss he is entitled to compensation. A correct description of the loss for which the [defendant] is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action…A duty of care …does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered".

235. Accordingly, Mr Malek submitted that in cases such as this, the Court is required to undertake a three stage enquiry about the damages to be awarded, and to consider:

i) What would have happened had the defendant not made the negligent misstatement (or, as far as the February 1996 complaint is concerned, had they given the information to which the claimants were entitled).

ii) In light of i), whether the claimants are worse off because of the negligence, and if so by how much.

iii) How much of that loss is of a kind attributable to the misstatement (or the fact that the claimants were not given the information to which they were entitled).

Mr Malek submitted that the claimants have disregarded the third stage of the enquiry.

236. The claimants' response is that all their loss resulted directly from the fact that the account at Coutts did not in fact have the characteristics of a proper client account, in that it was subject to the mortgage debenture which gave Coutts rights of security and

set-off and the right to transfer funds to any other account of HMU that was in debit, as Coutts did when operating the sweeper arrangement. Whether this is an adequate response depends upon the scope of the relevant duty that Coutts are to be supposed to have contravened.

237. I have held that the undated letter was misleading in that, when it was written, Coutts had the debenture and so had rights of security and set-off over the funds in the client account. If I had concluded that they were thereby in breach of a relevant duty of care and thereby caused loss, then I would have held that the resultant loss fell within the contemplation of the duty only in so far as Coutts exercised such rights. They did not do so when making transfers under the sweeper arrangement. It is nothing to the point, in my judgment, that Coutts could have made such transfers under clause 15 of the debenture: I have found that they did not in fact do so. The only loss of a kind that would have fallen within the contemplation of the duty would have been any loss resulting from the exploitation by Coutts in October 1997 of their rights of set-off when they transferred the balance of £572,419 from the client account. The measure of that loss depends upon how it would have affected the distribution to the claimants upon the winding-up of HMU if that sum had been an asset of HMU available for general distribution. I am not in a position to say what the effect of that would have been.

238. The application of the third stage of the enquiry is more complicated in the case of the February complaint, and, probably as a result of how the claimants' case developed during the trial, I received no submissions about it. According to Norman Reitman, more than £11 million was transferred from the client account to the general account under the sweeper arrangement. However, Mr Malek pointed out that the sweeper arrangement was simply a mechanism whereby HMU transferred from their client account sums which on any view they could have transferred to their general account by specific instructions from time to time. It cannot be said that all transfers from the account under the sweeper arrangement represent losses to the claimants. It seems to me that the claimants would have difficulty in showing that any of their loss was of a kind within the contemplation of any duty upon Coutts to inform them of the introduction of the sweeper arrangement. However, the question not having been argued before me, I do not decide this point.

239. I leave aside another point concerning the claimants' case on the measure of their loss for a similar reason. In his submissions in reply, Mr Flaux put forward for the first time a calculation of loss that ignored profits that the claimants made under the first binding authority after 9 August 1995. I did not hear Mr Malek in response to Mr Flaux's submission, and Coutts might well have good grounds to dispute this point, at least as far as the August 1995 complaint is concerned.

Was any loss that the claimants suffered wholly or partly caused by the claimants' own fault, and so either wholly or partly irrecoverable?

240. It remains to consider Coutts' arguments (i) that the claimants' loss was entirely caused by their own fault, and therefore no loss is attributable to Coutts' breach of

duty; and alternatively (ii) that the damages fall to be reduced by reason of the claimants' contributory negligence. Mr Malek, in opening Coutts' case, summarised the criticisms of the claimants as follows:

i) They relied upon the undated letter, despite its want of clarity, without seeking to have its meaning clarified and without contacting Coutts about it.

ii) They did not review their position when they entered into the second binding authority, but continued to rely upon the undated letter.

iii) They ignored the warnings given by Whittington.

iv) They ignored the indications in the financial information that they received from HMU that they were not operating a trust account, as the claimants allege they should have been.

241. I can deal with the first two points shortly. I have held that Coutts did not owe the claimants any relevant duty of care, and in doing so have held that it would not have been reasonable for them to have relied upon the undated letter in deciding to subscribe to the second binding authority. Coutts' arguments arise only if these conclusions are wrong. In these circumstances, it does not seem to me that it would have been open to Coutts to argue that the claimants were at fault in relying upon the undated letter, or in doing so without clarifying its meaning or confirming their understanding of it. It was, I must suppose for the purposes of this argument, Coutts' duty to take reasonable care not to mislead underwriters who might subscribe to the second binding authority, and if they were in breach of that duty, Coutts could not in the absence of special circumstances complain about the claimants' reliance on the letter if it had that very consequence: see Gran Gelato v Richcliff, [1992] Ch 560 at p.574C-E. I reject the first two criticisms.

242. Before considering the criticism of Harvey Bowring's response to Whittington, I shall deal with a submission of Coutts that by about January or February 1997 the claimants, or at least Harvey Bowring, suspected or actually knew that HMU were not operating a separate bank account for underwriting monies. In support of this submission they relied in particular upon an undated note that, they argued, reflects Harvey Bowring's knowledge that HMU were failing to meet their obligation to keep a separate account. I set it out in full:

"HMU Binding Authority

Actions inconsistent with spirit of joint adventure.
Inadequacy of Margin
Inability/Unwillingness to increase rates/deds
Continued Tardiness and inadequacy of reporting.
Continual failure to deliver on agreed commitments (i.e. I.B.A. accounts)

A growing perception by us that goals of HMU were/are different to those of Harvey Bowring (i.e. Production, not Underwriting profit).
Two complaints via Lloyd's Complaints department.
Finex (subbed £183k @ Nov. '96)
HM Net".

243. The evidence about the provenance and purpose of this document is not satisfactory. Mr Keeling had no recollection of the document. He suggested that it might be a "list of sins" written in preparation for terminating the binding authority, but he was far from certain about this. He was, however, inclined to think that it was written in about January 1997. In a witness statement dated 2 May 2003, Mr Andrews stated that he recalled neither who wrote the document nor any discussion of its contents. However, when he was cross-examined about the document on 7 May 2003, he said that the document had been prepared in consultation between himself and Mr Keeling. He said that the note was "predominantly, if not entirely" his own, and that he recalled discussing it with Mr Keeling. He explained his new recollection by the "prompts" of questions put to him in cross-examination. The position was the more curious because on 30 April 2003 (or possibly 1 May 2003) the claimants' solicitors said this of the document: "We understand that this note was prepared in consultation between John Andrews and Richard Keeling ...We are unable to confirm when this document was prepared but it is probable that it was prepared after November 1996 and in all probability during 1997". It is difficult to suppose that the solicitors' instructions about the note came from anyone other than Mr Keeling or Mr Andrews.

244. Coutts submitted that the note was prepared in or about February 1997, if not before. I accept this submission. There are strong arguments in support of it. First, the note referred to two complaints before Lloyd's: these are likely to be the complaints concerning RDM Factors Limited and Emblem Design Limited, which were causing Harvey Bowring concern in early 1997. Secondly, there are references to "Net" (presumably meaning HM Network) and Finex, and Mr Andrews learned about the shareholdings in these companies when Harvey Bowring were arranging the security for the deferred repayment of commission in or about January 1997. Moreover, the language used in the document ("spirit of joint venture") to some degree reflects language used by Mr Andrews in a letter to Mr Venton on 9 January 1997 when explaining what had been learned of the ownership of HM Network and Finex: "We are extremely perturbed by these actions as we believe them to be detrimental to the interests of the Lloyd's shareholders and not in mutually agreed spirit of the alliance".

245. Coutts went on to argue that the document shows that, when it was written, Harvey Bowring were aware that HMU were not maintaining a separate account for underwriting monies because of the words, "Continual failure to deliver on agreed commitments (ie IBA accounts)". When asked about this, Mr Andrews said that he understood that the abbreviation "i.e." means "for example", and that the note meant simply that HMU had continually failed to meet their obligations, a complaint illustrated by the failure before August 1995 to open a separate bank account.

246. This explanation surprised me. I readily accepted, in view of Mr Andrews' answers in cross-examination, that Mr Andrews misunderstood the meaning of "i.e.". However, even allowing for this, it seemed to me remarkable that Mr Andrews should have included in a list of complaints to be raised in early 1997 a problem that he understood to have been resolved some 18 months earlier. I was the more circumspect about accepting Mr Andrews' evidence because in his witness statement he had denied any knowledge of the note.

247. On reflection, however, I accept Mr Andrews' explanation. I am not persuaded that in early 1997 he knew or suspected that HMU were not operating a separate account. Even allowing that Mr Andrews had been far from alert in responding to warnings that he had had about the account (in particular in the Whittington reports, to which I shall refer shortly), I consider that if Mr Andrews had known or suspected this in early 1997, he would have taken decisive action before July 1997, and he certainly would not, in my judgment, have extended the second binding authority without resolving the matter. Moreover, if Mr Andrews had known the position, he would have told Mr Keeling. After all, Harvey Bowring extended the second binding authority as late as 25 June 1997 whereas, when they did learn about HMU's bank accounts a fortnight later, they terminated the binding authority immediately.

248. I therefore consider the criticisms that the claimants ignored the warnings and indications that they were given about the client account on the basis that none of them, including Harvey Bowring, actually knew or suspected before the Norman Reitman audit that HMU were not maintaining a client account of the kind that they expected, and using it for underwriting funds.

249. I have concluded that, having been told by Whittington that they were uncertain whether HMU were properly operating the client account, Harvey Bowring did nothing to ascertain whether or not HMU were in fact doing so. They ought to have pursued the matter, and their failure to do so was unreasonable. In my judgment, their failure broke the chain of causation, and prevents the claimants from arguing that any loss that they subsequently suffered resulted either from what Coutts said in the undated letter or from the fact that Coutts did not tell them of the sweeper arrangement. The claimants, having not shown when between February 1996 and July 1997 their loss was incurred, have not shown that it was caused by either the August 1995 complaint or the February 1996 compliant.

250. In reaching this conclusion I have not relied upon Coutts' argument that Harvey Bowring had other warnings that the client account was not being operated as they supposed. In particular, Coutts referred to financial information in the audited accounts and the management accounts received by Mr Dixon-Clarke after January 1996. Mr Dixon-Clarke fell ill before he was cross-examined about these. In view of the conclusions that I have reached, nothing turns upon these arguments, and in the circumstances I say only:

i) I am not persuaded that these criticisms of Mr Dixon-Clarke added anything significant to the argument that the chain of causation was broken.

ii) The criticisms were largely directed against Mr Dixon-Clarke in his capacity as a nominated director of HMU. Had anything turned upon them, I would have asked for submissions about whether these criticisms can found an argument that there was fault amounting to contributory negligence which is attributed vicariously to (a) Lloyd's Syndicate 362; (b) the other syndicates whose managing agents were shareholders in HMU; and (c) the other claimants.

Conclusion

251. I conclude that the claim should be dismissed.