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## EQUITAS V BRANDYWINE

By Lindsay McQuillian

The eagerly awaited judgment of Mr Justice Gross in *Equitas v R&Q Reinsurance (Brandywine)* should be handed down during October. This high profile trial saw *Equitas* faced with the challenge of establishing R&Q's liability for a sample of over 4,000 LMX spiral claims, and its outcome could see attempts to unwind the infamous spiral finally take effect.

The disputed claims arise out of Kuwait Airways losses during the first Gulf war, and the Exxon Valdez oil spill. The Kuwait Airways claims are complicated by the issue of the incorrectly aggregated British Airways loss (following *Scott v Copenhagen Re*), and the Exxon claims include elements ruled irrecoverable in *King v Brandywine*. A further obstacle to the task of assessing the position is the effect on the Kuwait Airways losses of US\$139 million of United Nations Compensation Commission refunds.

R&Q's case is that *Equitas* must present its claims stripped of the irrecoverable elements of the losses, and adjusted to take account of the refunds. *Equitas* agrees that these adjustments should and will take place, but the real question is whether this is even possible. *Equitas* is of the view that it can be achieved through the use of complex actuarial modelling.

A key question is whether Mr Justice Gross will accept *Equitas*' application of these modelling techniques, as effective to determine the

proportion of the liabilities falling to R&Q. The reverberations around the spiral of factors such as the irrecoverable losses and the effect of the refunds are extremely complex to track, and Counsel for R&Q was at pains to stress the spiral's magnifying effects. Gross J referred also to the "roadblocks" thrown up in the form of commutation agreements which may or may not have accounted for these elements. *Equitas* acknowledges that the spiral's effects make the losses impossible to quantify by conventional means, relying instead on the projected figures obtained from the models.

*Equitas* believes it is not necessary to trace the exact pathway of the losses through the spiral to ascertain what effect will be had on the ultimate net loss once the irrecoverable elements are removed - its models can demonstrate the effect on the bottom line (and indicate US\$1.43 billion as the lowest overall estimate of the claims, a stark illustration of the scale of this matter). R&Q insist the models are a blunt tool, which do no more than approximate reality.

R&Q say that in addition to adjusting its own claims, *Equitas* must prove that underlying contracts have been validly exhausted. *Equitas* maintains that it has presented its claims to the required market standard, and that it is unnecessary to prove the losses at every link of the reinsurance chain. R&Q argued at trial that there is no market practice available to give



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guidance in this unprecedented situation, and indeed attempts to find a market solution have met with failure. Equitas contends that market practice is nevertheless relevant in construing the clauses in the retrocession contracts governing proof of loss, and indicates in this case that comprehensive documentation of the underlying claims is not required.

If Equitas' use of modelling in this context is accepted it will set an important legal precedent, and a raft of further claims could follow. What is certain is that if the spiral is unravelled, the consequences for the numerous LMX reinsurers with claims paralysed pending Gross J's decision are impossible to predict.