IN THE JUDICIAL COMMITTEE **JCPC/2025/0020**

ON APPEAL FROM THE COURT OF APPEAL

OF GIBRALTAR

BETWEEN:-

ENTERPRISE INSURANCE COMPANY PLC (in liquidation)

Appellant & Respondent

AND

MR ANDREW FLOWERS

Appellant & Respondent

EIC'S RESPONSE TO MR FLOWERS' STATEMENT OF CASE ON HIS APPEAL

Introduction

1. EIC filed its Statement of Case on 4 March 2026 in which it dealt with both its appeal on the credits and Mr Flowers' appeal on Icebreaker.

2. Mr Flowers was granted an extension of time from 4 March 2026 to 15 March 2026 for the filing of his Statement of Case in relation to both appeals. He served his Statement of Case on 15 March; its Part 1 deals with EIC's appeal and is signed by Leading Counsel (Tom Poole KC); its Part 2 deals with Mr Flowers' appeal and is signed by Mr Flowers personally.

3. EIC has sought and been granted the opportunity to respond in writing to Part 2 of Mr Flowers' Statement of Case (**"AF's Icebreaker SoC"**) in advance of oral submissions. The need to do so arises because Mr Flowers has sought in his

Icebreaker SoC to rely on matters and advance arguments that are beyond his Grounds of Appeal and if Mr Flowers is representing himself on his appeal at the hearing on 29 April then it is right that, for Mr Flowers' assistance, he be aware of EIC's objections to his attempts to widen the scope of his appeal.

4. This written Response is confined to responding to the new matters raised by Mr Flowers in his IB SoC which are not part of his Grounds of Appeal and are not already dealt with in EIC's Statement of Case.

The Scope of AF's Appeal

5. As set out at paragraphs 79-80 of EIC's Statement of Case, AF's Grounds and AF's Further Explanation contend the CA: Page 48

    a. erred in law in its interpretation and application of clause 11.4 of the Icebreaker policies; and

    b. erred in failing to apply public-policy principles under **Patel v Mirza** [2017] EC 467; Page 1929

    and as these errors materially underpin the CA's conclusion that AF was negligent had the CA properly applied clause 11.4 and/or public policy principles, it ought to have found AF was not negligent because EIC was not on risk.

6. That is the extent of AF's appeal to the Board and any attempt by Mr Flowers at the hearing on 29 April to go beyond that, as it is clear in AF's IB SoC he is seeking to do, is and will be opposed.

Mr Flowers' Submissions Outside the Scope of this Appeal

7. At [1] of his IB SoC, AF says that this appeal is made on the basis that the CA erred in upholding the finding that AF breached his duty of reasonable care and skill in causing EIC to underwrite the policies. That, however, is correct only insofar as AF Page 70

specifically challenges the CA's legal construction of clause 11.4 of the Icebreaker policies and their enforceability under public-policy principles. It does not extend to challenging the upholding of the finding of negligence based on any other factor that AF may identify.

8. AF's IB SoC goes beyond relying on alleged legal errors in the construction of clause 11.4 and of public policy principles and seeks to re-argue matters which were the subject of findings of fact made against him by Restano J and unsuccessfully challenged in the CA. AF's appeal is confined to the errors of law specified in AF's Grounds and it is not open to him to make further and additional arguments in front of the Board.

9. In places, goes yet further and seeks to introduce new evidence that was not before Restano J or the CA; in particular Progress Reports/Reports to Creditors from the Liquidator.[1]

(1) Alleged Reliance on Legal Advice

10. AF relies in this appeal in his IB SoC[2] on having used Counsel, Nigel Feetham (now KC), to draft the Icebreaker policies and, he says, taking advice from him which he says gave him the reasonable belief that the Icebreaker scheme carried zero risk and was priced appropriately. This appears also to be relied on as part of his argument that EIC had the necessary "reasonable grounds for … belief" for the purposes of clause 11.4.

[1] See, for example reliance on the liquidator's progress report of 18th December 2025 at [36] and reports to creditors of 15th August 205 and 10th February 2026 at [36]-[37] of AF's IB SoC. The first must, in fact, be a reference to the liquidator's 15th report dated 18th December 2024 but the point still stands. Page 76

[2] At [2]-[3], [12]-[13] and [16]-[17] of AF's IB SoC. The Board should note that [17] of AF's IB SoC could suggest to the reader that the Restano Judgment at [426] states clause 11.4 of the policy was the result of Mr Feetham's advice. It does not; it simply records that as being AF's case at trial. Page 70

11. He also seeks to rely in this appeal on other advice taken from Ozon and Leading Counsel (Timothy Dutton KC) when policyholders were presenting claims.[3]

12. This fails to acknowledge the actual factual findings from Restano J at trial summarised at [832]: Page 444

> *"Despite Mr Flowers saying that he acted on extensive and high-level legal advice from legal KCs both as to the risks of the policy responding and in respect of an exclusion clause which was drafted by a leading lawyer, this was far from the truth. Mr Flowers chose not to obtain and* [sic] *independent legal advice on the risks of the policy responding...The involvement of Mr Feetham was limited and based on inadequate instructions, as was the involvement of Mr Dutton which only came later. There were also many red flags concerning this book of business which Mr Flowers should have paid attention to and followed up appropriately, but he did not. Instead, Mr Flowers proceeded to incept this business which carried with it a high concentration of risk knowing that there was already a challenge pending by HMRC to the scheme. In my view, this is not a nuanced case where different and legitimate decisions could have been taken on a book of business. Rather, the way in which Mr Flowers approached this book of business fell far short in many respects of the standard expected of someone in his position..."*

13. The CA records this finding at AJ [158] and specifically in relation to Restano J's findings in respect of Nigel Feetham KC and the alleged advice in respect of clause 11.4 at AJ [181]-[182].[4] Page 559

14. As is clear from AJ [159], AF sought to challenge all findings made by Restano J in front of the CA including arguing in front of CA that he had, contrary to Restano J's finding, *"acted reasonably on legal advice in taking the position he did"*.

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[3] AT [3]-[4] of AF's SoC. Page 71

[4] See also AJ [172]. Page 565

15. In front of the CA, the principal ground of appeal was the one which is reflected in this appeal to the Board, namely that properly analysed both clause 11.4 and the defence of public policy defeat any claims under the policy and therefore there would be no loss and no negligence (AJ [187]). page 572

16. However, the CA went on at AJ [188] to state:

> *"A second ground of appeal, which only arises if the principal ground fails, essentially repeats the contention advanced below that Mr Flowers had reasonably relied upon legal advice and therefore could not be said to be negligent. This was not pursued with any real vigour. In my view, it is unsustainable. The judge found that legal advice had been given on the basis of inadequate instructions and without the lawyers involved being fully cognisant of the true nature of the arrangements. He was entitled to hold that in the circumstances Mr Flowers could not hide behind that advice..."*

17. It is simply not open to AF on this appeal before the Board to contend that the Board should interfere with the CA's upholding of the finding of negligence against him in respect of Icebreaker as a result of any alleged reliance by AF on Nigel Feetham KC, Timothy Dutton KC or Ozon which would necessarily involve challenging findings of fact made by both the lower courts and which he has not done in this appeal and indeed has no grounds upon which he could so do. AF's appeal to the Board is confined to whether the CA erred in its objective construction of clause 11.4 and its application of public policy principles and what conclusions may properly be drawn from that in light of the unchallenged findings of fact.

(2) <u>Criticism of the Liquidator's admission/adjudication of Icebreaker policyholder claims</u>

18. There are a number of inappropriate criticisms of FW in AF's IB SoC, for example:

a. that FW refused to disclose advice he relied on at trial to admit policyholder claims [6];[5] and

b. criticising FW's admission of the Icebreaker claims as an inappropriate way to establish EIC's insolvency for the purposes of running a ratification defence [7] and [39]-[41].

19. As to the first of those points, the overarching challenge AF seeks to raise again is to FW's position, at trial, that he had been advised that he should admit policyholders' claims contrary to the position taken by EIC before it went into liquidation. This was dealt with, however, fully by Restano J at [833] where he said that no adverse inferences could be drawn from FW's decision not to waive his legal professional privilege but also went on to say:

> *"In any event, it is unfair to suggest that this is sinister in any way because despite asserting privilege over this advice, EIC's lawyers have set out in some detail at pages 111 to 123 of EIC's opening submissions its position in relation to each of these defences before it went into liquidation."*

20. That was not challenged by AF in front of the CA, neither was Restano J's finding at [840] that if AF or any person wished to challenge FW's decision to admit the claims that should form part of a separate challenge and was a separate issue to that of AF's breach of duty with which Restano J was concerned. AF is correct to say at [62] of his IB SoC that that point was left undisturbed by the CA – but that was because it was not a matter of appeal before them. It certainly cannot

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[5] Paragraph 6 of AF's IB SoC also states that the first indication from the liquidator that he had admitted a provision for claims was in August 2021 some five years after his appointment. This statement is factually incorrect. The Statement of Assets & Liabilities of EIC as at 25/07/2016 attached to FW's Provisional Liquidator's report (dated 21/10/2016), which was before Restano J, included a provision for Icebreaker claims of £19.5 million based upon advice from Clyde & Co.

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therefore now be raised as a matter of appeal before the Board as AF seeks to do in his IB SoC[6] (and AF has not done so in his Grounds in any event).

21. As to the second of those points; it has been found as a fact by Restano J and upheld by the CA that, as a matter of fact and relying on the relevant expert evidence, EIC was insolvent at the material time. A challenge to that finding forms no part of AF's Grounds and is not a matter properly therefore before the Board.

(3) Claim for Relief

22. The AF IB SoC[7] surprisingly seeks to argue in some detail that AF is entitled to relief under section 477 of the Gibraltar Companies Act 2014 because he acted *"honestly and reasonably and ought fairly to be excused"*. AF sought such relief in front of Restano J, and it was refused. He challenged this in front of the CA and that challenge was roundly dismissed at AJ [140] as inapplicable because of the CA's *"conclusion, upholding the judge, that Mr Flowers was neither honest nor were his actions reasonable."* page 554

23. It is not a matter within AF's Grounds to the Board and, in any event, appears to depend upon overturning the factual findings in respect of reliance by AF on legal advice which are also not before the Board and are, in any event, hopeless.

Relevance of Any Alleged Errors of Law as alleged by AF

24. AF has asserted in his Grounds and Further Explanation that the errors materially underpin the CA's conclusion that AF was negligent had the CA properly applied clause 11.4 and/or public policy principles, it ought to have found AF was not negligent because EIC was not on risk.

25. The attempt now by AF at re-running issues of fact determined against him both at first instance and on appeal shows that AF and not challenged in his Grounds on

[6] See [62]-[64] of AF's IB SoC. Page 107
[7] See [46]-[51] of AF's IB SoC. Page 102

this appeal shows some possible realisation that even if (which is denied) he succeeded on either of his Grounds in showing the CA erred at law in its construction and application of clause 11.4 or public policy that would not disturb the findings of negligence against him made by Restano J and upheld by the CA.

26. It is clear however that Restano J's findings on AF's negligence in respect of Icebreaker (as upheld by the CA) went beyond any negligence involving misguided reliance on clause 11.4 or public policy defences. In particular, as Restano J summarised at [841] TJ as recorded at AJ [186]: Page 448 Page 571

> *"…Mr Flowers should have made adequate inquiries about all the businesses that the LLPs were investing in, he should have obtained independent legal and tax advice about the changes to Icebreaker 2, he should have provided clear instructions on the exclusion clause to be included in the policies, he should have ensured that policyholders signed an appropriately drafted proposal form, and he should have considered reserving and reinsurance protection carefully and ideally with the assistance of actuaries. Further, the legal advice provided following the 2014 Acornwood decision was based on inaccurate instructions. For all these reasons, Mr Flowers as an experienced professional fell below the standard expected of a reasonably competent director with his attributes, and as a result has caused EIC loss…"*

27. Any success on AF's actual Grounds before the Board relating to clause 11.4 or public policy would, at best, therefore only result in an impact on quantum of any loss flowing from any negligence, as the CA explain at AJ [189]-[190]. The merits of the appeal on those Grounds is such, however, that that does not arise.

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25 March 2026

Counsel for EIC

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