A3/04/1441

Neutral Citation Number: [2004] EWCA Civ 1544
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(COMMERCIAL COURT)

Royal Courts of Justice
Strand
London, WC2

Tuesday, 2nd November 2004

B E F O R E:

LORD JUSTICE WALLER

- - - - - - -

RICHARD TROPP

Applicant/Defendant

-v-

THE SOCIETY OF LLOYD'S

Respondent/Claimant

- - - - - - -

(Computer-Aided Transcript of the Stenograph Notes of
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THE APPLICANT appeared in Person.

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J U D G M E N T
(As approved by the Court)

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1. LORD JUSTICE WALLER: This is an application by Mr Richard Tropp for permission to appeal an order made by Gross J on 24th May 2004 by which he gave summary judgment against Mr. Tropp in the sum of £463,881.28, that being the sum of £296,811.16, together with interest of £167.70.12. In making his attack on that decision Mr Tropp also attacks, first, the decision of Gross J dated 20th January 2004, in which he dealt with the question whether the English court had jurisdiction and whether there had been proper service made on Mr Tropp. He also attacks the decision that certain requests for further information and requests for disclosure under Part 18 and Part 31 were to be decided at the same time as the application for summary judgment, and he attacks the decision of Gross J in relation to certain of those requests which the judge refused. If Mr Tropp is to attack the order relating to jurisdiction of 20th January 2004, he will need an extension of time in which to appeal. That also he applies for.

2. As Gross J correctly recorded, this is a further sad postscript to the upheavals in the Lloyd's market which took place some years ago. Mr Tropp, as he made clear in his concluding remarks to me, feels very deeply that he should be allowed a trial. He feels that he should be allowed to make the requests and insist on answers to the requests that he has made. He submits that it will be a blot on our system if he cannot have that trial.

3. We have a system, as do the courts in the United States, which allow for a summary process if the case is appropriate for a summary process. Of course, no case that is inappropriate for a summary process should be dealt with by a summary process. But the importance of having that process cannot be over-emphasised. It would be quite wrong for cases to go to trial if there were not issues to be tried. If issues go to trial, where the time of the court and the parties is taken up with dealing with issues which should not be there, there is a serious wastage so far as the court is concerned, and there is a serious wastage so far as the parties are concerned. If, for example, this case were even to go to an appeal at this stage, one would have to recognise that this would involve Lloyd's being represented, as well as Mr Tropp being present, and it would expose Mr Tropp to the possibility that he would have to pay Lloyd's costs if he lost. The same would go for a situation in which, if that court decided that there should be a trial, there would be a trial at which Lloyd's would be represented. If at the end of that process there was no issue that had been fit to be tried, it would have involved expenditure which would have to be met by Mr Tropp. The question whether a case is suitable for trial and whether the summary process should be applied is an important one, and one which is in no way a blot on the system.

4. The sum claimed in this action and for which Lloyd's at present have summary judgment, represents the Equitas premium due pursuant to a reinsurance contract dated 3rd September 1996, entered into, on Lloyd's case, between Mr. Tropp acting through a Substitute Agent, Additional Underwriting Agencies (9) Limited ("AUA 9") and Equitas Insurance Limited ("Equitas"). The benefit of that right to premium was assigned by Equitas to Lloyd's, as is evidenced by a Deed of Assignment dated 2nd October 1996. That reinsurance contract was an integral part of the Lloyd's market reconstruction and renewal scheme, often called R and R. The history is well known and provides the context in which the reinsurance contract was entered into. Mr Tropp

came into the category of non-accepting Names, in the sense that he did not accept the terms offered, although he suggests that he did accept other terms. Thus, in his written submissions he disputes that description.

5. As to the make-up of the principal sum claimed, it comprised various elements recorded in a schedule to the particulars of claim, and those elements are set out in paragraph 3 of the judgment of Gross J. They included losses declared to 31st December 1994 which were not called by 15th March 1996, deferred losses declared at 15th March 1996, called but unpaid losses at 15th March 1996, including interest charged to 31st December 1994, interest and associated exchange rate adjustments from 1st January 1995 to 15th March 1996, and Equitas additional premium/release. The intention was that those figures making up the premium reflected the liabilities of the individual members, and thus the figures represented Mr Tropp's liabilities.

6. Mr Tropp does not criticise the direction which Gross J gave himself in relation to the relevant test as to whether a case was suitable for summary judgment. The judge set out a summary of that test in paragraph 4 of his judgment. It is unnecessary to repeat that here, but it is perhaps important to stress that the judge recognized that if a case should go to trial, then the court should allow it to do so, and that it is only in a case in which there is no realistic chance of a defence succeeding that summary judgment should be given.

7. The issues before Gross J involved, first, the proper construction of certain clauses of the reinsurance contract. Those clauses have been the subject of previous decisions, both of the Commercial Court and of the Court of Appeal. The second question -- indeed this took up the greater part of the judge's judgment -- was whether some compromise independent of the R and R scheme had been reached between Lloyd's and Mr Tropp, or whether at least such consensus as had been reached would give rise to some form of estoppel preventing Lloyd's bringing their claim against Mr Tropp. Thirdly, Mr Tropp took a point in relation to the substitute agents appointed by Lloyd's to enter into the reinsurance contract. He submitted that AUA 9 was a mere dummy, that it could not exercise any underwriting judgment, that it was a creature of Lloyd's, and thus was an entity which on any view should not be entitled to agree on his behalf the conclusive evidence clause, even if there were other aspects which it could have legitimately agreed. He further took a point in relation to AUA 9, which was much the same point but in a different legal context, which related to the service of these proceedings on AUA 9, a matter dealt with by Gross J in his judgment of 20th January 2004.

8. It is right to set out at the outset the clauses of the reinsurance contract which should be considered. I will not read them out, having regard to the time. They are clearly set out in paragraph 6 of the judge's judgment, clause 5.5, 5.9 and 5.10. It is 5.10 which provides for conclusive evidence in the absence of "any manifest error".

9. In summary, what Gross J has ruled is, first, that AUA 9 was an entity and one recognized by the courts in previous decisions and thus that it had the authority to make the contract that it did and accept service, as was agreed to by the reinsurance contract. Second, the judge ruled that, none of the many points which Mr Tropp sought to argue

gave rise to a manifest error in the figures, entitled him to sidestep the conclusive evidence clause and, thirdly, the judge held that there was no basis for asserting that there had been a compromise agreement reached, because the judge held that it was the clear understanding of the parties that before final agreement was reached the same would be reduced to writing. No such writing ever eventuated as signed by both parties. The judge further ruled, in relation to the questions in Part 18 and Part 31, that albeit some questions should be answered, in the main the questions would not be material and thus should not be answered, having regard to the conclusion that he had reached in relation to the points on manifest error.

10. The test for me, as I indicated to Mr Tropp at the outset, is whether permission to appeal should be granted at this stage in relation to the various aspects of the judge's ruling. Permission to appeal should only be given where there is a reasonable prospect of persuading a full court that the decision which has been sought to be appealed should not have been made, or where there is some compelling reason why an appeal should be heard. I have to consider whether there is a reasonable prospect of success or a compelling reason in relation to the summary judgment that the judge gave. I have to consider that same question in relation to the arguability of the AUA 9 points in the different contexts in which they arise, and I have to consider and apply the same test in relation to the Part 18 and 31 requests and whether the question whether they should be answered should have been heard at the same time as the summary judgment, and whether they should have been ordered to be answered.

11. The logical place to start is with AUA 9. This is the second point which Mr Tropp argued before me this afternoon and the second point in his notice of appeal. Mr Tropp suggests that he has evidence, which was not before the courts which have considered AUA 9 on previous occasions, showing that AUA 9 was simply a dummy under the control of the Lloyd's Corporation. He submits that the directors were effectively dummies of Lloyd's, that it was Lloyd's employees who signed documents on behalf of AUA 9 and, although he was prepared to accept that it might be appropriate to allow such an entity into many of the terms of the reinsurance contract, it was inappropriate that such an entity should be entitled to agree the conclusive evidence clause.

12. The attack on AUA 9 was an attack made, first, in the context of the jurisdiction issue. Gross J dealt with that attack in detail in his judgment given on 20th January 2004 (tab 34 of the bundles). The judge in that judgment deals with the various points that Mr Tropp takes, first holding that plainly AUA 9 is a corporate entity and indeed a separate corporate entity. He deals from paragraphs 17 through to 31 with the authority of AUA 9 and holds that AUA 9 would have and did have authority to act. He then also deals with the point taken by Mr Tropp in his written submissions relating to conflict of interest relating to the fact that the employees or the persons acting for AUA 9 were Lloyd's employees. He points out that in The Society of Lloyd's v Leighs the Court of Appeal recognized that AUA 9 validly acted as agent for Names. The judge in effect held that Mr Tropp's suggested basis for distinguishing that decision is simply unarguable. As it seems to me, the reasoning of the judge is impeccable in this regard. It is clear that in previous decisions AUA 9 has been plainly recognized, and its connection with Lloyd's has been expressly recognized. In my view, insofar as Mr Tropp seeks now to attack the authority of AUA 9, either to agree any part of the

reinsurance agreement or to be authorised to accept service, he cannot succeed and will not succeed in the Court of Appeal.

13. He stresses that his jurisdiction point is different from his authority point but in truth they do come to very much the same thing, because the question is whether AUA 9 had authority to make the agreement that it did. In that agreement it was a term that service could be effected on AUA 9, and once there is a consensual basis for effecting service that is an end of the matter. That deals with AUA 9.

14. It is convenient next to deal with the points that relate to manifest error. Ground 1 of Mr Tropp's grounds of appeal seeks to suggest that the judge applied too narrow a test of manifest error. In his written submissions he refers to a number of authorities but those authorities relate to different contracts. His difficulty is that the very clause and the very phrase "manifest error" in this particular reinsurance contract has been construed by this court in the past. He seeks to place a gloss on what Hobhouse LJ said in The Society of Lloyd's v Fraser. He seeks to suggest that the judge in his judgment has not followed accurately the guidance given by Hobhouse LJ (as he then was), but in my view the gloss that Mr Tropp seeks to place on Fraser is not an appropriate gloss. As I would read the judgment of Gross J, he has correctly directed himself by reference to the proper construction of "manifest error" as indicated by Hobhouse LJ.

15. Mr Tropp then suggests that there are various matters that he should be allowed to argue as showing that there was a manifest error in the figures claimed by Lloyd's as part of his Equitas premium. The main thrust of his argument related to the limit which he suggests he placed on the type of business that was to be written. He explained that he was very much aware of the environmental risks which became the underlying cause of the enormous losses that Lloyd's suffered, and thus it was his instruction that there should be no environmental risks and indeed no long term risks which might carry with them those environmental risks. He suggests that environmental risks were written, but in particular he is critical of the fact that a very large percentage of the business taken on by his Syndicate was not new business but was business taken on as a result of the reinsurance to close. He suggests that when one looks at certain of the documents to which he drew my attention, which were tax returns, one can see that as much as 95 per cent, or thereabouts, of the business taken on by the Syndicate was this long tail business, including these environmental risks, and only a very small percentage was new business. He also suggests that some of the business written on his behalf was written in breach of duty by his managing agents or in conflict with other business written by them. He further asserts in his written submissions -- he did not suggest this orally -- that certain stop loss policies had been promised to him but had not been made available.

16. The problem with all these lines of argument is that they suffer in my view, and this was the view of the judge, from the same defect. They all involve criticisms of the managing agents or those who underwrote for the syndicates of which Mr. Tropp was a member. They may support claims that he may have or may have had against those managing agents, or those who underwrote for him, in relation to their failure to follow his instructions, but in considering whether the figures which Lloyd's put in their schedule H, and which are quoted in paragraph 3 of the judge's judgment, there is no

room for an argument that there is a manifest error in those figures, simply by reference to claims that Mr Tropp may have had that some business should not have been written which he had given instructions should not be written.

17. So far as the stop loss is concerned, he takes another point. He asserts that certain of the proceeds have not been credited to him. This is a point that he has made in his written submissions. He did not expand in his oral submissions on it. The answer appears to be that, either the stop loss policy was successfully assigned so as to be able to take into account in the figures, in which event there will be no failure to take the stop loss into account or -- this is a point which Lloyd's accepted and is recorded in the judge's judgment -- if the proceeds were not assigned, then that stop loss is still available to Mr. Tropp. This argument does not provide any basis for arguing any manifest error in Lloyd's figures.

18. Before the judge Mr Tropp also took a point about having resigned in relation to the 1991 year but before me he did not argue that he was not underwriting for that year. That he was underwriting for that year is in any event the effect of the evidence. Although he wished to resign the fact is that he was not able to resign so as to be able to relieve himself from the liabilities for that year. Again, that provides no arguable point on manifest error.

19. The position is that, insofar as manifest error is concerned, in my view the judge dealt with this fully, and there is no prospect of Mr Tropp being able to succeed in the Court of Appeal on any argument that he has put up in relation to it. There is no compelling reason for allowing him to run those points in the Court of Appeal. Indeed, as I sought to explain at the beginning of this judgment, it would be positively to his disadvantage to allow him to do. He would be liable for the costs of Lloyd's if allowed to do so.

20. That brings me to the question of settlement and the question whether there might be any estoppel which might prevent or should have prevented Lloyd's from commencing these proceedings. Mr Tropp was troubled about the fact that he did not have a proper opportunity to put together a bundle relating to this aspect before the matter was heard by the judge. Indeed, he explained to me that the bundle appeared to stop when there was further correspondence which it was material for the judge to see. Mr Tropp's difficulty is that if he wanted to run an argument that there was a complete agreement, then, whether or not Lloyd's were putting in another bundle, he had the opportunity to put together such material as he wanted to put in so that this matter could be argued. It is not necessary to go further into that because he is not now suggesting that all the material is not before the court. When one examines all that material he is faced with the same difficulty as he was faced with before the judge. Mr Tropp says, in essence: "Surely a deal is a deal when two persons agree it over the telephone. Here I had a deal with the Chief Executive of Lloyd's. The Chief Executive of Lloyd's knows that he had a deal." Unfortunately parties can get very close to there being a binding agreement in law without there being a binding agreement. Indeed, when they get that close some might criticise one party who then reneges on what had apparently been achieved orally. Mr Tropp says that this is an instance where Lloyd's were agreeing to accept a figure of $5,000 and now have totally reneged on that figure. I have to say that I have some sympathy with Mr Tropp on that, as far as I have looked at the correspondence.

But one thing is clear, and that is that the judge was right in law. Indeed Mr Tropp at one stage was constrained to accept that the judge was right, that nobody, neither Mr Tropp nor those from Lloyd's, thought that there would be a binding contract until, not only a figure had been agreed, but the details of the settlement agreement had been reduced to writing and signed by each side. As Mr Tropp at one stage put it, he would not have gone on asking for that document if he did not believe that until he had it he did not have a fully tied up deal. As I see it, there is no answer to the judge's point, that in this instance an agreement had not finally been reached as a legally binding agreement.

21. Mr Tropp would seek to argue for something less so as to give him some form of estoppel. That is an impossible argument. He either had an agreement under which there was a settlement and which would preclude Lloyd's from bringing this action or he did not. If he did not, then it seems to me that there can be no basis for holding that Lloyd's should be estopped in any way from bringing the action that they have. There is no prospect of persuading the Court of Appeal to take a different view from that taken by the judge in relation to settlement.

22. So far as the Part 18 and 31 requests are concerned, what I sought to get Mr Tropp to do was to identify any request for disclosure under Part 18 or Part 31 which went outside the points on which the judge had ruled that there was no arguable case on manifest error. I did that for obvious reasons, because if and insofar as the requests, which simply have gone to items which were not arguably manifest error, the judge was right in saying that he would not order disclosure or answers. At first, Mr Tropp explained to me one item which related to a question which the judge had ordered to be answered and which Lloyd's should answer, so that matter cannot help. He then went to two matters. The first related to what I can describe as the clawback point. Mr Tropp's assertion is that the agents have been deducting commissions and that Lloyd's were under an obligation to obtain those commissions as part of the deal that was done in connection with the R and R, and that if those commissions were taken into account, or if he could discover by requesting information that there were sums which Lloyd's had failed to recover under clawback, that would affect his case on manifest error. It seems to me that in this area the judge was again right. What the judge said in paragraph 22 is this:

> "As to the application of various credits available, or said to be available to Mr Tropp, some, say Lloyd's, have been applied or if they have not been the failure is down to a Members' Agent not passing over the money or indeed to Mr Tropp. But be all that as it may, Lloyd's in any event has no obligation to allow any such credit against the monies claimed. (See Clause 5.9 of the Reinsurance Contract)."

As it seems to me there is no answer to that point.

23. On the next point Mr Tropp seeks to suggest that in some way, because of the deal done between Lloyd's and Equitas, in relation to the assignment of premium and the RITC debts, that this was a security arrangement, as the assignment itself makes clear. Thus

he argues in some way he would have been released by the recovery that Lloyd's have made. This is dealt with in paragraph 23 of the judge's judgment where the judge said:

> "Mr Tropp's submission as to the assignment is likewise bad, essentially for the reason given by Mr Yeo in his skeleton argument:
>
> 'Whether or not Lloyd's has already recovered the amount secured by the assignment of the RITC debts does not affect Lloyd's title or ability to continue to collect those RITC debts, since the assignment was a valid assignment at law.'
>
> Further and yet again, even if all this is wrong the highest it can be put is that Mr Tropp has his remedy by way of counterclaim. Clause 5.5 it must be underlined and re-emphasised does not preclude counterclaims. But still no defence is disclosed to the Lloyd's claim."

As it seems to me, that again is right. There was an assignment of the premium due to Equitas to Lloyd's. Lloyd's are entitled to sue for that premium. In effect, it is not to the point that the amount of the RITC debt was secured by the assignment.

24. There is one other point which, although perhaps more minor, relates to the interest. Mr Tropp suggests that interest should not run from the date from which the judge suggested it should run. Mr Tropp was arguing that since Lloyd's effectively strung him along in suggesting that there would be an agreement, the interest should run from the time when the negotiations broke down. That was an argument put to the judge. The judge, in the exercise of his discretion, held that since Lloyd's were out of their money there was no reason why interest should not date back, no reason why it should run from some later moment. In reaching that conclusion the judge was exercising a discretion. In some instances it may be that a different judge might have taken a different view. The view that the judge took cannot be said to be wrong or such as would enable a court of appeal to interfere. There is no prospect of persuading the Court of Appeal to reverse the judge on this aspect.

25. As I indicated at the outset, Mr Tropp will be disappointed with the result of this application which must fail. But, as I said at the outset, he must at least take comfort from this, that he will not have to meet the costs of Lloyd's with which he would have been saddled if he had been allowed to pursue a hopeless appeal at which they had been represented. In the circumstances this application for permission to appeal must be dismissed.

ORDER: Application refused; application for stay refused; application for permission to appeal to the House of Lords refused; application for a stay of the Part 18 question on quantum refused.

(Order does not form part of approved judgment)