2002/848

Neutral Citation Number: [2004] EWHC 3335 (Comm)
IN THE HIGH COURT OF JUSTICE
COMMERCIAL COURT

Royal Courts of Justice
Strand
London WC2

Friday, 5 November 2004

B E F O R E:

MRS JUSTICE GLOSTER

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LLOYDS

(CLAIMANT)

-v-

R A TROPP

(DEFENDANT)

Tape Transcript of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR N YEO appeared on behalf of the **CLAIMANT**
MR TROPP appeared in person

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

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1. MRS JUSTICE GLOSTER: This is Lloyds' application to have Mr Tropp's counter-claim struck out. Mr Tropp was a former name at Lloyd's. Lloyd's principal claim, to which this was the counter claim, was for recovery of Mr Tropp's premium under the Equitas reinsurance and run off contract which was an integral part of Lloyds' reconstruction and renewal plan implemented in 1996. Lloyds obtained summary judgment against Mr Tropp on 24 May 2004 from Gross J. Leave to appeal against that judgment was refused by Waller LJ.

2. Mr Tropp's counter claim falls into two distinct categories. First, there is a counter-claim for recalculation and restatement of his and his syndicates; and Lloyds' financial position, as a result of what Mr Tropp calls in his skeleton argument and in his statement of case "self-reinsurance to closing" and/or "self RTC-ing" and consequential reimbursement to him. Secondly, he counter claims damages for libel, slander and malicious prosecution or falsehood. He relies, in particular, upon certain settlement discussions in relation to his second head of claim, namely his defamation and related claims.

3. The application is made on the basis (a) that the counter-claim does not disclose any reasonable grounds for bringing the claim, (b) that the defendant has no real prospect of succeeding on it, and (c), in relation to paragraphs 49 to 52, that they are an abuse of process. It is common ground that, in such circumstances, under CPR Part 3.4, a strike out should only take place in clear and obvious cases where, in effect, the claims are clearly non-sustainable or indeed fanciful.

4. By "self RTC-ing", Mr Tropp appears to be referring to the syndicate reinsuring to close at the end of the syndicate's accounting period in relation to all liabilities then on the syndicate's books, even if that happens to include long term liabilities, which themselves have been taken on as a result of another syndicate, or an earlier embodiment of the present syndicate, reinsuring to close at an earlier time.

5. Thus, for example, in paragraph 38 of his counter claim, Mr Tropp alleges that, in substance, Lloyds failed to supervise and regulate the market to prevent this RTC-ing from happening and claims specific performance of the relief to which he says he is entitled and, in addition, damages. What he says is:

> "The defendant avers ... that there had been a systematic institutional performance failure by Lloyds, a failure to supervise in its market promotion capacity and to regulate under its statutory delegation of authority in turning its head to and consciously avoiding rather than seriously reviewing and providing relief for wrongful behaviour by particular agencies which victimise Mr Tropp and others on his particular syndicates."

6. He then alleges specifically that there an was endemic and continuing failure of corporate ethics and governance at Lloyd's and a pattern of non-feasance, and of deliberate avoidance, by Lloyd's and its officers, of its supervisory, regulatory and institutional responsibilities. He says that it is because of such pervasive failures in

governance, and, arguably, of moral courage that he, Mr Tropp, applies to the court for the remedies now sought.

7. He claims specific performance in the following respects; (a) that the reinsurance to close in relation to long-tail liabilities should be unwound (that is to say, reversed out of Equitas), (b) that any prior self RTC-ing should be also be wound back to the first syndicate, as though (in his words) he had entered into a arm's length RTC so as to re-open and run off that syndicate - that is the claim at paragraph at 40(S); (c) in paragraph 40 (A) and (G), and at paragraph 41, in effect, that there should be a recalculation and a restatement of his losses and his syndicate results and consequently Lloyd's' results; (d) at paragraphs 40 (C) to (E), under the heading "Internal discipline" and "Claw back", an order requiring Lloyd's to discipline managing agents and sue them to recover commissions. Finally, Mr Tropp's claim for damages is at paragraph 40 (B), where he claims a refund with compound interest and consequential losses based, on a recalculation of prior losses of the syndicates which he lists in schedule H to his counter-claim.

8. It is also relevant to refer to paragraphs 120, 130 and 146 of his helpful skeleton argument, where he sets out his claim in much greater detail. It became clear in the course of Mr Tropp's helpful and, at all times, courteous submissions to this court that, in effect, what Mr Tropp was submitting was not merely a negligent breach of duty on the part of Lloyd's, but also a fraudulent and deliberate breach of duty on Lloyd's' part. I refer in particular to those three paragraphs and also paragraph 13 of his skeleton, where he summarises his evidence and, in particular, certain internal Lloyds documents including regulatory and tax filings for the UK and US governments and internal communication from Lloyds to its managing agents. These include: sample tax filings by Lloyd's for the relevant syndicates to the US Governments; sample Equitas' quotations prepared by an internal Lloyd's Working Group and other internal Equitas type quotations.

9. What he says -- and again I am only summarising -- is that one can see from the information which he has put before the court produced internally by Lloyd's that Lloyd's knew at the time of the claim that what Lloyd's had stated to Mr Tropp and the court in schedule 8 of the particulars was, in fact, not true. In paragraph 120, he says that Lloyd's knew perfectly well, when it attempted to collect the premium from him, that the amounts claimed in relation to the premium, related to liabilities in his long-tail syndicates which to a considerable extent, were not true insurance losses because they failed the fortuity or uncertainty test required of a contract of insurance.

10. He says that the evidence to which he refers shows that by the time of R & R and, a fortiori, the date of the claim against Mr Tropp, Lloyd's knew that these liabilities were inevitabilities and that the syndicates were not truly writing insurance business, but simply taking over what were going to be inevitable losses. He further contends that the sample evidence shows that Lloyd's knew that it was trying, in effect, to recover premiums from him in relation to future liabilities that were not truly insurance liabilities because such liabilities had been put fraudulently into his syndicate. Mr Yeo, on behalf of the Lloyd's, on the other hand, submits that each of the remedies fails because Mr Tropp cannot establish any liability on the part of Lloyd's claimed by Mr

Tropp. First it is contended that Lloyd's is not liable for damages in negligence or for breach of duty at the suit of a name in relation to any discretion it has exercised, except in very limited circumstances and Mr Yeo referred me to section 14(3) of the Lloyd's Act 1982 to which I refer below. Secondly Mr Yeo submitted that Lloyd's is not under any obligation to supervise the underwriting decisions of managing agents, nor to protect names from breaches of duty of their agents, nor to regulate the business of insurance at Lloyd's with reasonable care. In short, he submitted, relying on **Society Of Lloyd's v Clementson** [1995] CLC 117 that there is no assumption of responsibility on the part of Lloyd's to supervise underwriting decisions of managing agents. This applies equally to a managing agent's decision as to what business to accept from another syndicate, which is looking to reinsure to close irrespectable of whether that other syndicate is at arm's length. Likewise he referred me to **R (on the Application of West) v Lloyd's** [2004] 3 All ER 251 and the dictum of Leggatt LJ that was approved by the Court of Appeal in **West** at paragraph 17.

> "17. There have been,as I have said, a number of decisions of the Administrative Court in which it was said that the decisions impugned in those proceedings were not amenable to judicial review. In R v Lloyd's of London ex p Briggs [1993] 1 Lloyd's Rep 176 the Divisional Court was concerned with a case in which members of Lloyd's challenged the legal validity of cash calls made on them by the managing agents of their syndicates. The court's conclusions on the issues that are relevant in the present proceedings were set out crisply by Leggatt L at p 185:
>
> "It does not help to refer to the respondents as regulators or to describe the system administered by the Corporation of Lloyd's as a regulatory regime as is done in the Form 86 in these proceedings. The fact is that even if the Corporation of Lloyd's does perform public functions, for example, for the protection of policy holders, the rights relied on in these proceedings relate exclusively to the contract governing the relationship between Names and their members' agents. We do not consider that that involves public law. That is consonant with Mr Justice Saville's conclusion that a Name was not entitled to disregard a cash call made in good faith by the members' agents. We accordingly endorse [counsel's] submission that 'all of the powers which are the subject of complaint in the present application are exercised by Lloyd's over its members solely by virtue of the contractual agreement of the members of the Society to be bound by the decisions and directions of the Council and those acting on its behalf.'.
>
> Lloyd's is not a public law body which regulates the insurance market. As [counsel] remarked, the Department of Trade and Industry does that. Lloyd's operates within one section of the market. Its powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd's and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd's. In our judgment, neither the evidence nor the submissions in the case

suggest that there is such a public law element about the relationship between Lloyd's and the Names as places it within the public domain and so renders it susceptible to judicial review."

11. Mr Yeo also submitted that it was clear that Mr Tropp's claim for an unwinding is tantamount to the rescission of numerous successive strings of reinsurance contracts. He relied on the decision of **Lloyd's v Leigh** [1997] CLC 1,398 (CA) and **Lloyd's v Fraser** [1998] CLC 1,630 (CA) which make it clear that Names cannot rescind their underwriting commitments, even if they were induced as a result of negligent or fraudulent misrepresentations since to do so would affect third parties. This was also a point made by Gross J in his judgment given on 24 May 2004 in these proceedings at paragraph 16.5. Mr Yeo submits that the other claims for recalculation of commission and damages therefore fall away since they depend on an unwinding.

12. I should note, at this juncture, that, despite paragraph 12 of his written submissions, he did not rely on clause 5.5(b) of the reinsurance contract to submit that Mr Tropp was precluded from pursuing his counter-claim. Accordingly, I approach this application to strike out on the assumption that, despite the express provisions of clause 5.5(b) (which is recited in Gross J's judgment on the application for summary judgment), Mr Tropp is not precluded by that clause from bringing a counter-claim.

13. Mr Yeo went on to submit that Mr Tropp has suffered no loss, and therefore has no standing, in relation to any claim based on advance profit commissions paid under the triple profit release arrangements, since that arrangement (and thus the profit commissions) only apply to those underwriting in the years 1993 to 1995. Mr Yeo submits that Mr Tropp's last year of underwriting was 1991, and the fact that some of his syndicates may have been run off over that period is irrelevant. Therefore, the taking of such advance profit commissions did not adversely affect any of Mr Tropp's syndicate. That indeed seems to be the position on the evidence.

14. Mr Yeo also relied on the fact that, since Lloyd's has immunity from any damages claim, i.e, Mr Tropp's claim to a refund) by virtue of section 14(3), absent Mr Tropp showing bad faith or action in purely an administerial capacity (i.e without the exercise of discretion, Mr Tropp's case is doomed to failure. He also submitted that the Court of Appeal has made it clear in **Price v Lloyd's** [2001] Lloyd's Reports AR 453 at 460 and **Laws v Lloyd's** [2003] EWCA Civ [1887] paragraph 69, that since Lloyd's owes no positive duty to supervise or regulate agents, mere inactivity on the part of Lloyd's cannot amount to bad faith so as to avoid section 13 of the 1982 Act.

15. However, Mr Tropp attempts to avoid application of section 14(3), and the immunity provided by that section, by submitting that, irrespective of whether or not Lloyd's had a positive duty to supervise or regulate agents, and irrespective of whether mere inactivity would amount to bad faith, on the evidence one sees not mere negligence or mere inactivity. On the contrary, he submits that Lloyd's active and actual conduct amounted to participation in effect -- and he did not shrink from putting it this high -- in fraud. Mr Tropp submitted that Lloyd's consciously abused its position because it knew there were no actual insurance liabilities; that therefore it was being deliberately dishonest when it came to seek recovery of the premiums from him because it must

have known of the lack of fortuity and of the fact that the liabilities of his long-tail syndicates were not genuine insurance losses because they failed the fortuity test. This was because, as I have said, he asserts that at the time Lloyd's bought those losses of the syndicate into the Equitas scheme Lloyd's was well aware that this business was not proper reinsurance to close insurance business, but was merely a means of transferring inevitable losses from one syndicate to Equitas.

16. The second way Mr Tropp seeks to avoid section 143 is by recharacterising his counter-claim as one brought against Equitas not Lloyd's, but that, as Mr Yeo points out, cannot stand up because the proceedings are clearly brought against Lloyd's not Equitas. Secondly, Mr Tropp seeks to argue that the immunity should be confined to a situation where an action is brought by a member of the community in his capacity as a Name as distinct from an insured policyholder or as the beneficiary of the Equitas Trust. Again, Mr Yeo submits, and I accept, that this is equally fanciful. They are not distinct categories or capacities; the latter two are subsets of the former. A person can only have the benefit of reinsurance to close, whether into Equitas or into another syndicate, if he is a Name. He is therefore a policyholder in his capacity as a Name.

17. For these reasons, and subject to the attempt by Mr Tropp to formulate the claim effectively in fraud, I accept Mr Yeo's submissions that in effect these counter-claims are fanciful. They have, in my judgment, no prospect of success. I come to that conclusion myself, although if, and in so far as, the judgment of Gross J impacts on those views, I rely on it and come to the same conclusions as he did, for the same reasons as he did. Accordingly, I do not need to address the issue as to whether or not and, if so, to what extent, and on what issues, Gross J's conclusions were res judicata as between these two parties.

18. I turn next to the claim based on fraud, that is to say Mr Tropp's claim, as set out in paragraph 38 of his counter-claim and amplified in submissions before me, that Lloyd's with knowledge, whether a deliberate shutting of its eyes, as explained in **Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd** [2003] 1 AC 469 or consciously avoiding the problem, brought the losses of the relevant syndicates into the Equitas scheme, knowing that the business was not proper reinsurance to close. I again accept Mr Yeo's submissions that there is no adequately pleaded case in fraud or deliberate non-feasance of duty such as can possibly survive a strike out claim. Nor, although I have looked at them carefully, do any of the documents that have been produced by Mr Tropp support evidentially what are at best unformulated allegations of fraud made in an attempt to get round section 43.

19. Accordingly, so far as the first heads of counter-claims are concerned, I strike them out on the basis that they have no real prospect of success.

20. So far as the claims of libel, slander, malicious prosecution and falsehood are concerned, the words which are alleged to have been defamatory are said to have been made in Lloyd's pleadings and in statements to the Inland Revenue. In effect, what is said is that the statement made by Lloyd's that Mr Tropp owed Lloyd's his Name's premium in the amount pleaded, and that he had not paid such premium, were defamatory statements. I was taken to the relevant passages in Gatley on Libel and

Slander. It is clear that, in so far as those words were used in Lloyd's pleading or witness statements, they are subject to absolute privilege, which even proof of malice does not lift. So far as the word were used in a communication to the Inland Revenue, Mr Yeo submits, and I accept, that they were clearly justified because they were indeed true. The judgment of Gross J giving Lloyd's summary judgment for just that sum has, in the event, shown that Mr Tropp had no arguable defence to Lloyd's claims. Mr Tropp was liable and he had not paid what he was liable to pay. In those circumstances, it is impossible to see in my judgment how Mr Tropp can possibly have any claim, whether in libel, slander, malicious prosecution or falsehood since the statements were in fact true.

21. What Mr Tropp seems to be arguing, is that the truth of the statement cannot be maintained because of the settlement discussions that had been going on over a considerable number of years between him and Lloyd's. The claim here is somewhat unclear. What Mr Tropp seems to be saying is that there was some sort of estoppel operating which prevented Lloyd's from stating that he was indebted to them and, because of that estoppel, what were in fact true statements became defamatory. I find it very difficult to follow the logic of this argument. In any event, in my judgment, having looked at the entirety of the correspondence which I have been shown, that is to say both the correspondence which was before Gross J and subsequent settlement correspondence after 2 March 2000, Lloyd's made it clear at all times, first, that the settlement discussions were subject to contract; secondly, that although Lloyd's were in general terms willing to settle in order for such a settlement to be reached, Mr Tropp had first to execute a form of individual settlement agreement in terms acceptable to Lloyd's and thirdly, that Lloyd's was not prepared to amend the terms in the way that Mr Tropp had requested.

22. In my judgment there is nothing in any of the further correspondence, or indeed in the earlier correspondence before Gross J, that suggests that Lloyd's made any relevant representations to Mr Tropp to the effect that it would not sue or that it was definitely going to settle. It is clear from the correspondence that, at all times, Lloyd's reserved its position, and made it abundantly clear that, if its terms were not met, it would reserve its right to sue, as indeed it did. Nor in my judgment does the correspondence disclose that Mr Tropp relied on any such representation.

23. Irrespective of whether that is issue estoppel between the parties or res judicata, I come to the same conclusion as Gross J on the evidence that Mr Tropp had not relied upon any settlement agreement being forthcoming during the first phase of settlement discussions. Gross J said:

> "I can see no reason even arguably against that background why the position later on should have been any different."

24. That being so, I see no basis upon which Mr Tropp could possibly succeed in relation to his claims purportedly based on defamation in malicious prosecution and malicious falsehood. Therefore I propose to strike them out.

25. Mr Tropp very fairly accepted that there was no concluded or binding agreement as between him and Lloyd's to settle. The nub of his complaint was that they had indicated to him that they were in general amenable to a settlement. That is as maybe, but it was clear to him at all times that they were leaving their options open, as indeed was he.

26. Finally, Lloyd's seeks a declaration that in so far as Mr Tropp applied to add as defendants the proceedings past or present officers, employees or agents of Lloyd's, the claims that have been pleaded against these people are claims against them in their capacity as agents, and that therefore they should not be joined; and in any event that they are fanciful and an abuse of the process.

27. I have carefully considered the matters that Mr Tropp has urged on me as set out in a letter dated 4 November 2004 which I received this morning. He refers to the fact that, in his counter-claim, he has sought the joinder of various third parties, and the fact there is no separate application before this court for him to do so. Again I should make it clear that I take no technical point on the absence of any formal application before the court. I assume for the purposes of argument that there is such formal application before the court. Had I been minded to accede to Mr Tropp's application to add these persons as defendants, I would have done so irrespective of the absence of any formal application.

28. However, looking at the counter-claim and its paragraph 46, Mr Tropp seeks the joinder of the managing agencies, their controlling holding companies and all the individual controlling principals of each and various other parties as described in 46 (A) as well as a whole list of people as set out in paragraph 46, including officers, employees and agents of Lloyd's and members of the Members Agency. In my judgment, in circumstances where I am striking out the counter-claim against Lloyd's, it is not an appropriate course, and indeed would be an abuse of process to leave these proceedings alive against these vast numbers of persons.

29. So far as the employees of Lloyd's are concerned, who clearly were acting in that capacity as agents, on well-established principles, there could be no joinder in any event because, absent some specific misconduct (which is not alleged here), an agent is not liable for the torts of his principal. Leaving aside that point, it seems to me that if Mr Tropp wishes to bring claims against his Members' Agents or his Managing agents, or indeed controlling principals, then he must bring fresh proceedings against such parties in which he properly formulates his cause of action against each identified person whom he seeks to join as a defendant. It is wholly unsatisfactory in what is basically a counter-claim against Lloyd's for him to seek to use these proceedings as a spring board into making claims against other persons in circumstances where I am striking out the counter-claim against Lloyd's.

30. Accordingly, I am not prepared to let this counter claim proceed. I shall strike it out. It would not be a legitimate function of court procedure to allow Mr Tropp to proceed to a full trial, merely in the hope that he will be able to obtain evidence to mount a case through discovery or cross-examination. This litigation is highly speculative and, as I have said, in my judgment it does not disclose any reasonable prospect of success.

31. Accordingly, I propose to strike out the counter-claim on Lloyd's application.

32. I should say in closing that I am very grateful to both Mr Tropp and Mr Yeo, in particular in Mr Tropp's case for the very lengthy and helpful submissions which he made and the helpful way and courteous way in which he addressed his arguments to the Court. I am also similarly grateful to Mr Yeo.