

Defendant's Exhibit Number 10

A3/2005/1100

Neutral Citation Number: [2006] EWCA Civ 88
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMMERCIAL COURT
QUEEN'S BENCH DIVISION
MRS JUSTICE GLOSTER

Royal Courts of Justice
Strand
London, WC2

Monday, 23 January 2006

BEFORE:

LORD JUSTICE BROOKE

LORD JUSTICE RIX

THE SOCIETY OF LLOYDS

Claimant / Respondent

- v -

TROPP

Defendant / Appellant

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(Official Shorthand Writers to the Court)

THE APPELLANT APPEARED IN PERSON

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED

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

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1. LORD JUSTICE RIX: This is the application for permission to appeal of Mr Richard Tropp, a litigant in person. I am indebted to Mr Tropp for his careful submissions, which can be found in his lengthy grounds and skeleton arguments. His written submissions, and today his oral submissions, speak volumes for his hard work and research in an area of law which I think is not even that of his own nationality, for I think he comes from America, and he has worked extremely hard to present his case to this court, and no doubt to the court below, as clearly as he can.
2. His application arises out of claim brought by the Society of Lloyd's as assignee of Equitas' claim under the Reinsurance and Renewal contract of 1996 (R and R), for the Equitas premium applicable to Mr Tropp as a Name at Lloyd's. Mr Tropp is one of that minority of Names at Lloyd's who did not sign up to R and R, but who have, nevertheless, found themselves in the uncomfortable position of having to meet claims for the Equitas premium which, under the R and R contract was imposed upon them, pursuant to their obligations at Lloyd's, despite the fact that they were not specifically consenting to the R and R contract. On 24 May 2004 Gross J heard the Society's Equitas premium claim against him in summary form, and granted summary judgment. That judgment was obtained, as happened not infrequently in these courts over the last few years, with the help of clauses in the R and R contract which contain conclusive evidence and no set-off provisions. In those circumstances, Mr Tropp's ability to resist that claim was limited, judgment was given against him, he sought permission to appeal against that judgment from this court but failed before a court presided over by Waller LJ on 2 November 2004.
3. There remains, however, Mr Tropp's counterclaim in the proceedings brought against him by the Society, which of course was not touched by the no set-off provisions of R and R. That counterclaim was considered by Gloster J in her judgment of 5 November 2004, which is the judgment from which this application for permission to appeal arises. In her judgment she gives her reasons for summarily dismissing Mr Tropp's counterclaim on the strike-out basis that his litigation was highly speculative and did not disclose any reasonable prospect of success. As part of that strike-out, she refused to give permission to Mr Tropp to amend his counterclaim to join to it numerous - indeed very numerous - other parties apart from the Society, in the form of Mr Tropp's managing agents, or members' agents, or controlling principals of those agencies or, in other cases, individual persons.
4. I should also mention that applications by Mr Tropp for further information or disclosure from the Society which he made pursuant to Part 18 or Part 31 of the CPR were rejected either as part and parcel of Mr Tropp's failure on the Equitas premium claim before Gross J, or to the extent that Gross J left over for consideration, as part of the counterclaim proceedings, certain of those requests for further information or disclosure, failed before Gloster J as part of her strike-out judgment.
5. What, then, is Mr Tropp's counterclaim? It has been developed and elaborated in his written and oral submissions, but the essence of it has to be found in the particulars of his statement of case, and I therefore take the essence of the counterclaim from his

document headed "Defence and Counterclaim" at section 7 of the appeal bundle before us, in particular at paragraph 38, which I will read:

"The defendant avers to the Court, in contemplation of the relief he will seek in the counterclaims to follow, that there has been a systemic institutional performance failure by Lloyd's -- 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 victimised Tropp and others on his particular syndicates. This is compounded by Lloyd's claim now seeking more fruit of the arguably poisonous tree.

"At trial, in evidence documenting years of rebuffs by various Lloyd's offices as he sought internal relief, Tropp will shown an endemic and continuing failure of corporate ethics and governance, a pattern of nonfeasance and deliberate avoidance by Lloyd's and its officers, of its supervisory and regulatory institutional responsibility.

"It is because of such pervasive failure in governance, and arguably of moral courage, that Tropp prays the Court for remedies now sought."

6. Mr Tropp then in his counterclaim, under the heading "Remedies Sought in Counterclaim" set out declarations or specific performance that his counterclaim sought. First, he sought a declaration that his counterclaim did not fall within the immunities to liability provided by section 14 of the Lloyd's Act 1982; he also sought specific performance by Lloyd's of its obligations under the Lloyd's Act 1982, concluding but not limited in particular to what are described as recalculations of his losses and liabilities, a refund to him of monies revealed by the recalculation, and a claw-back or unwinding of R and R, if not earlier reinsurances to close (RITCs) in his syndicates; and with reference to the further parties whom he sought to join by amendment to his counterclaim, a declaration for what he describes as "a disgorgement" of his pro rata share of the fees and expenses taken in error out of the syndicate's reserves by managing and members agents and their like.
7. So that is the essence of the counterclaim made, both against the Society and against third parties yet to be joined to that counterclaim. So far as the Society is concerned, the counterclaim sets up a systemic failure to exercise its supervisory regulatory institutional responsibilities and, pursuant to that, seeks monies by way of recalculations and claw-backs and unwindings of RITC premiums, the effect of which has been debited to Mr Tropp and his fellow Names; and against the third parties yet to be joined, he seeks fees and expenses involved in the RITC process. I am trying, very swiftly, to expound and gloss Mr Tropp's pleadings, but that is the essence of what I find in his counterclaim.
8. One of the questions which arose before Gloster J was whether that counterclaim raised a case in fraud against the Society. Fraud is not addressed expressly and specifically in the counterclaim to which I have referred, but nevertheless the judge

was prepared to assume, with the assistance of Mr Tropp's skeleton arguments and oral submissions, that his reference to the Society turning its head and consciously avoiding - or deliberately avoiding - its supervisory and regulatory responsibilities amounted to a dishonest, or reckless, disavowing of its responsibilities, what has been described at times as the dishonesty involved in "shut-eye knowledge" - a reference of course to Admiral Nelson's famous putting of a telescope to blind eye.

9. That, as I say, is the essence of the counterclaim, involving as the judge was prepared to accept, at any rate for the sake of argument, a claim in fraud. Nevertheless, in elaborating his submissions in writing and orally, Mr Tropp has also spoken about fault on the part of the Society, or perhaps others as well, and remedies to which that fault gives rise, he submits, arising out of the general law of insurance, as found either in the Marine Insurance Act 1906, and in particular section 17 with its reference to the duty of utmost good faith, or elsewhere in that Act, or in the common law of insurance as that has been developed in the courts' jurisprudence.
10. Nevertheless, despite erudite references to English insurance law, statutory or common law, what is not easy to discern from Mr Tropp's submissions are the particular causes of action upon which he relies for the purposes of his counterclaim, other than I have sought to express them by reference to the counterclaim itself expanded by the incorporation of a case in fraud. Thus, although the counterclaim refers to breaches of supervisory duty there is no express reliance upon express terms of contract, or indeed implied terms of contract, between Mr Tropp and the Society. Of course, as a Name, Mr Tropp was entering into a range of contracts - not with the Society, but with members' agencies and managing agencies - and of course as a Name he was entering into all kinds of insurance contracts, underwriting contracts and reinsurance contracts as one Name on a body of Names known as a syndicate.
11. Indeed, for these purposes, Mr Tropp has referred us to the comparatively recent case of Sphere Drake Insurance v Euro International Underwriting [2003] Lloyd's Rep IR 525 in which Thomas J found a case of dishonesty proved by the claimants in that case, Sphere Drake Insurance Ltd, against a combination of agencies and individuals. Mr Tropp relies upon Thomas J's analysis in that case of what really amounted to a dishonest conspiracy by the defendants involved to reinsure dishonestly, to insure or reinsure apparent risks which were, in truth, going to lead to inevitable losses as a result of underwriting done in past years, and to do that without proper disclosure to the insurers or reinsurers. It may be, I do not know, I say nothing on the subject, that similar claims if made by Mr Tropp against agents with whom he dealt and underwriters who were effectively in charge of the business of the syndicates upon which he was a Name, might lead to similar claims being aired with possibly similar success. I know not, but Sphere Drake was a case which was brought against agents and individuals and not against the Society. I do not understand how that analysis can be brought home against the Society by reason of any doctrine of the Marine Insurance Act or of insurance law other than through the analysis which I find in Mr Tropp's counterclaim that is an analysis of the breach of the Society's regulatory and supervisory functions.

12. The difficulty about that, however, is of course that section 14(3) of the 1982 Act provides an express immunity for the Society from liability in damages otherwise than for fraud. The section can be found set out in an annex to the judgment of this court in Jaffray v Society of Lloyd's (unreported, 26 July 2002), where this court considered at considerable length the claim by various Names under the lead of Mr Jaffray, who has given his name to the case, in fraud against the Society, but rejected their claim. Those claims were rejected not because of any immunity contained within section 14(3) — expressly, fraud lay outside such immunities — and not because the Names in that case were not able to go so far as to point to representations which were found to amount to misrepresentations, but because their case in fraudulent misrepresentation otherwise failed on the merits, on the basis that dishonesty was not proved.
13. It is well known that, in order to ensure that a case in fraud against the Society could be considered over as wide a base as possible, notice was given through the Commercial Court that all Names, apart from Mr Jaffray, who wished to bring a claim in fraud should join themselves to those proceedings, as they were permitted to do. Their various ways of putting a case in fraud were considered, but all failed, not, as I say, on the basis of not having a representation upon which to rely, but upon the basis of no dishonesty.
14. How then, in this case, does Mr Tropp seek to avoid the immunity in respect of all breaches of duty sounding in damages other than in fraud, or the jurisprudence of these courts, the Commercial Court and this court, in recent years which has made the path of a Name seeking to claim against the Society a stony path? Perhaps I should just briefly mention the leading cases in recent years which I, and indeed Mr Tropp, have in mind in this connection. In the Society of Lloyd's v Clementson [1995] CLC 117 this court dealt with a submission as to the nature of the effect of section 14(3). At page 122 Sir Thomas Bingham MR said this:

“The clear and simple purpose of this agreement [he was referring to the underlying agreement and undertakings that a Name entered into with the Society of Lloyd's upon becoming a Name, and in order to become a Name] was to ensure that on his becoming a Name, Mr Mason became subject to the regulatory regime of Lloyd's. The clauses governing choice of law and venue were ancillary to that object. No contractual obligation was needed to restrain Lloyd's from acting unlawfully, *ultra vires* or in bad faith, because it had no power to do so and could be restrained from doing so without the need to rely on any contract. It was in no way necessary to the efficacy of the contract that Lloyd's should regulate and direct the business in its market with reasonable care, and bearing in mind the terms of section 14 of the Lloyd's Act 1982, it is plain that such a term would not have been unquestionably accepted. Mr Mason was subjecting himself to the regulatory jurisdiction of the body of which he was becoming a member and consisting of his fellow members. For the management of his underwriting business he would

look to his own agents and not to Lloyd's. In contractual terms there was no more to it than that."

15. That was a leading case going back to 1995, in which it was emphasised that the Society was conducting a regulatory activity and that it owed to the Names no contractual obligations outside that regulatory activity and no terms needed to be implied, not even a term concerned with an obligation not to act in bad faith, because none was needed. Thirdly, this court recognised that, were the Society in its regulatory functions acting unlawfully, or in excess of its powers (*ultra vires*) or in bad faith, it could be restrained from doing so.
16. The next case I would mention is the Society of Lloyd's v Leighs [1997] CLC 1398. In that case, Lloyd's regulatory activity in approving the R and R contract, and thus in ensuring that the R and R contract was binding on all Names who had given undertakings to the Society of Lloyd's, and not only those Names who expressly accepted the offer made to them under the R and R contract, was acting *intra vires*. I refer to page 1402h-1403c and would merely cite within this judgment the short paragraph at 1403b, thus:

"R and R, and in particular the Equitas scheme is not, of course, simply designed to provide cover against the risk of individual defaults. It has a much more fundamental object - to settle intractable litigation and to avoid the need to put the whole of Lloyd's into run-off. In short, a primary object of the scheme, if not the primary object, has been to save Lloyd's itself, for the benefit of its members. We find it hard to see how it can be argued that the scheme has not been: 'requisite or expedient to the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society.'"

17. That case also held that, for separate reasons, it was not open to rescind the obligations entered into by the Names, pursuant to their Lloyd's underwriting or to the R and R contract.
18. Next I would refer to the Society of Lloyd's v Fraser [1998] CLC 1630, also in this court, which again upheld the R and R scheme, and held that an argument of bad faith was no defence to a claim for the Equitas premium, but would have to be progressed by way of a separate counterclaim. In Price v Society of Lloyd's [2000] Lloyd's Reports -IR 453 Colman J considered and summarily rejected a claim against the Society in fraud. He said at 460:

"In order to make good a claim for damages for breach of contractual, common law or statutory duty, it is in any event necessary to establish that Lloyd's acted in 'bad faith' under section 14(3) of the Lloyd's Act 1982. That means that the conduct relied upon as the breach of duty must be tainted by fraud or in some material respect dishonest. Mere negligence is not enough, nor is administrative incompetence. If, in the absence of section 14(3) there would be no underlying enforceable duty

to act, it is impossible to see how mere inactivity on the part of Lloyd's can be relevantly fraudulent or dishonest so as to provide a means of avoiding the effect of section 14(3).

"Having considered the evidence produced by Mr and Mrs Price as to the gross incompetence with which their syndicates were administered by RTY and by the underwriter, Mr Bullen, particularly with regard to the lack of errors and omissions cover, in 1990 and 1991 and as to what Lloyd's knew about this incompetence from the General Review Department report, from the Coopers and Lybrand Loss Review and from what emerged in the Berriman v Rose Thompson Young Underwriting Ltd [1996] LR LR 426 before Morison J, I am entirely unpersuaded that there is any *prima facie* case which could be made against Lloyd's that its inactivity was primarily or partially motivated by the personal interests of those taking the decisions and that therefore it acted fraudulently or dishonestly, let alone in breach of any relevant duty. For these reasons, this ground of claim has no real prospect of success."

19. That decision was more or less contemporaneous with Cresswell J's decision after trial to similar effect in the Jaffray case. I have already referred to the Court of Appeal's rejection of the case in fraud on appeal in Jaffray.
20. I need mention two more cases. One is Laws v Society of Lloyd's [2003] EWCA Civ. 1887 (unreported, 19 December 2003). That was the case in which an attempt was made to bring home against the Society claims by reason of the undermining of the section 14(3) immunity through reliance on the Human Rights Act 1998, which had by then come into operation on 2 October 2000. In his judgment Waller LJ rejected the reliance upon the Human Rights Act for at least two separate reasons. One is that the Act was not retrospective before 2 October 2000 - that reasoning is applicable to Mr Tropp's case as well - and secondly, Waller LJ and this court held that because section 14 was not a mere procedural bar but conferred a substantive immunity, for that reason it did not engage any remedy through article 6 of the ECHR. Moreover, in that case this court considered yet again whether a case could be made in fraud and it held that, in the absence of a fraudulent misrepresentation, a case in bad faith could not be merely premised upon a breach of a duty to advise Names because it had already been held in Clementson, but also in Ashmore v Corporation of Lloyd's (No. 2) [1992] 2 Lloyd's Rep 620 and in Price v Society of Lloyd's that no such duty to advise existed. Finally, again in this court, in R on the application of West v Lloyd's of London [2004] EWCA 506, [2004] 3 Au ER 251 this court had to consider, for the purposes of a claim brought in judicial review, whether there was any remedy in judicial review or under the Human Rights Act, and this court held that because the Society of Lloyd's was not a public authority for the purposes of the Human Rights Act, and because its objectives were commercial rather than public, there was neither judicial review of its functions nor was there available any relief under the HRA.

21. That is the jurisprudence which Mr Tropp had to overcome. How did he seek to do so? His essential new point is that a consideration of the travaux préparatoires in Parliament, whether in committee or otherwise, showed two things. First, that the section 14 immunity was designed to protect Lloyd's only in its regulatory functions and not otherwise, and secondly that the immunity was an immunity against a claim for damages and not against other remedies such as in judicial review or for declarations, injunctions, specific performance or the like.
22. Following redoubtable research, Mr Tropp is able to make a persuasive case that section 14(3) ought to be construed in that way. I will assume, for the purposes of this application, that this is so. The question is, nevertheless, whether Mr Tropp's counterclaim is a counterclaim brought against Lloyd's for other than breach of its regulatory function. It seems to me that, on the plain wording of Mr Tropp's counterclaim which I began this judgment by referring to and reading from, that that is not so. In truth, Mr Tropp has, I fear, been misled into a false submission, as I would describe it. He has assumed that because, for the purposes of asking the question whether judicial review relief or Human Rights Act relief is available against the Society, and the answer that it is not because it is not a public body performing public regulatory functions, therefore it follows that the Society did not perform regulatory functions at all. In that he is, I fear, in error. It is quite clear, as Mr Tropp's counterclaim itself has as its fundamental premise, that the Society was for relevant purposes fulfilling, or seeking to fulfil, regulatory functions. But its regulatory functions under the 1982 Act were private regulatory functions, or what has been described as "self regulation",- that is to say self regulation by a private and not a public law body. So it simply does not follow from the fact that the Society is not a public body, is not amenable to judicial review, is not amenable to the Human Rights Act, that it was not performing regulatory functions- it seems to me it was, it seems to me that Mr Tropp's counterclaim is fundamentally premised upon the fact that it was.
23. Pursuant to the same submission, Mr Tropp seeks to argue that the remedies which he seeks in his counterclaim are not in damages but other remedies such as a declaration, or an unwinding, or a disgorgement, or recalculation, or such matters to which I have referred in dealing with his counterclaim. It seems to me, however, that these expressions are in truth nothing else but an attempt to avoid putting his claim in damages for supervisory failures that is the essence of the counterclaim. Indeed, in a number of passages in his written submissions, or today in oral argument, Mr Tropp has emphasised what he is not seeking to do: he does not seek to rely upon a duty to advise, he does not seek to rely, he says, upon any misrepresentation, he does not seek to rely upon a claim in damages. What is he then seeking to do? How does he put his claim? There is, as this court indicated as long ago as Clementson, no claim in contract against the Society, there can only be a claim in fraud based upon dishonesty and if Mr Tropp seeks, as the judge assumed he was seeking, to put a claim in fraud, the remedy is in damages - there may also, of course, be a remedy in fraud for rescission, but Mr Tropp says that he is not seeking rescission. It seems to me, nevertheless, that in one way or another Mr Tropp is seeking to make good a financial

