

Defendant's Exhibit Number 6

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

[2004] EWHC 1397 (Comm)
CASE NO. 2002/848

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 24th May 2004

Before:

THE HONOURABLE MR. JUSTICE GROSS

B E T W E E N :

THE SOCIETY OF LLOYD'S

Claimant

v

RICHARD ABRAHAM TROPP

Defendant

MR. YEO appeared on behalf of the CLAIMANT

THE DEFENDANT appeared in person

Transcript of the Official Tape Recording by
Sorene Court Reporting & Training Services
(Member of the Tape Transcription Panel)
73 Alicia Gardens, Kenton, Harrow, Middlesex HA3 8JD
Tel: 020 8907 8249
Fax: 020 8907 5820

JUDGMENT
(As Approved by the Court)

MR. JUSTICE GROSS:

1. This case represents another sad postscript to the upheavals in the Lloyd's market of some years ago.
2. By application notice dated 11th March 2004, the Claimant ("Lloyd's") claims summary judgment under Part 24, CPR against the Defendant ("Mr. Tropp") for:

"1. The sum of £296,811.16...

2. Interest in the sum of £236,748.63 up to 19 August 2002 and continuing at the rate of £48.79 per day... because the Defendant has no real prospect of successfully defending the claim and there is no other reason why the case should be disposed of at trial."

3. The principal sum claimed represents the Equitas reinsurance premium due pursuant to a reinsurance contract dated 3rd September, 1996 ("the Reinsurance contract"), entered into between Mr. Tropp and Equitas Reinsurance Limited ("ERL"), the benefit of which was assigned by ERL to Lloyd's, as evidenced by a Deed of Assignment dated 2nd October, 1996. Pausing there, the Reinsurance contract was an integral part of the Lloyd's market Reconstruction and Renewal scheme ("R & R"); the history of that scheme 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. As to the make-up of the principal sum claimed, it is comprised of various elements, recorded in Schedule H to the Particulars of Claim as follows:

| | |
|--|----------------|
| "Losses declared to 31 December 1994 but not called by 15 March 1996 | (£87,024.00) |
| Deferred losses declared at 15 March 1996 | (£5,373.00) |
| Called but unpaid losses at 15 March 1996 (including interest charged to 31 December 1994) | (£95,085.00) |
| Interest and associated exchange rate adjustments from 1 January 1995 to 15 March 1996 | (£9,371.00) |
| Equitas additional (premium)/release | (£114,439.00) |
| ... | |
| Total | (£311,292.00)" |

4. There was no disagreement with the relevant test for summary judgment; both parties expressed themselves content with the summary which I ventured in Babcock v Mitsui [2002] EWHC 2728 (Comm), at para. 24, where I said this:

"In the light of the guidance given by *Swain & Hillman*... and *Three Rivers DC v Bank of England*..., an application under

Part 24 should be approached as follows:

- (1) Ordinarily, disputes are to be resolved at trial, on the evidence and after completion of disclosure and other pre-trial procedures; in that sense, Part 24 confers on the court an exceptional power.
 - (2) Properly used, the Court's power under Part 24 is a salutary power; it is there, ultimately in the interests of all concerned, to dispose of cases (or issues) that are not fit for trial at all.
 - (3) The test of whether a case (or issue) is fit for trial, is whether there is a real prospect of the claim or defence, as the case may be, succeeding; "real" is equivalent to "realistic" and is to be contrasted with "fanciful".
 - (4) It is not appropriate to utilise Part 24 for the purpose of conducting a mini-trial on the documents without disclosure and without oral evidence..."
5. In a nutshell, Mr. Yeo who appeared for Lloyd's submitted that the case was appropriate for summary judgment because, as a matter of law, Mr. Tropp had no real prospect of successfully defending it. Mr. Yeo relied in particular on the following matters: (1) First, on the conclusive evidence provisions of cl.5.10 of the Reinsurance contract, subject only to manifest error of which none could even arguably be shown here; (2) Secondly, on cl.5.5 of the Reinsurance contract, which, in respect of the Equitas premium constituted a "pay now; sue later; no set-off" clause; (3) Thirdly, on the established principle that there was no question of Mr. Tropp having a right of rescission, which would impact to the detriment of third party policy holders. This approach, Mr. Yeo submitted, was supported by (at least) the following decisions: Society of Lloyd's v Leighs [1997] CLC 759 (Colman J); 1,398 (CA); Society of Lloyd's v Fraser [1998] CLC 1,630 (CA); Price v Society of Lloyd's [2002] 1 Lloyd's Rep IR 453 (Colman J). In the light of this legal framework, the reality was that Mr. Tropp's position was hopeless and summary judgment should be entered.
6. Before proceeding further, it is appropriate to set out the terms of cll. 5.5, 5.9 (given a point raised by Mr. Tropp) and 5.10 of the Reinsurance contract:

"5.5 Each Name shall be obliged to, and shall pay his Name's Premium in all respects, free and clear from any set-off, counterclaim or other deduction on any account whatsoever including in each case, without prejudice to the generality of the foregoing, in respect of any claim against ERL, the

Substitute Agent, any Managing Agent, his Members' Agent, Lloyd's or any other person whatsoever, and:

- (a) in connection with any proceedings which may be brought to enforce the Name's Obligation to pay his Name's Premium, the Name hereby waives any claim to any stay of execution and consents to the immediate enforcement of any judgment obtained;
- (b) the Name shall not be entitled to issue proceedings and no cause of action shall arise or accrue in connection with his obligation to pay his Name's Premium unless the liability for his Name's Premium has been discharged in full, and
- (c) the Name shall not seek injunctive or any relief for the purpose, or which would have the result, of preventing ERL or any assignee of ERL from enforcing the Name's obligation to pay his Name's Premium.

5.9. ERL shall be entitled to set-off against the Name's Premium of any Name who is not an accepting Name any amount which ERL would otherwise be obliged to pay to that Name pursuant to clause 3 as reinsurer of any Syndicate 1992 and Prior Business insofar as it relates to any personal stop loss contract or estate protection plan of that Name.

5.10. For the purpose of calculating the amount of any Name's Premium as set out in Clause 5.1(b) and the amount of any Name's Premium discharged by the transfer of assets or the amount realised through the liquidation of Funds at Lloyd's for application in or towards any Name's Premium the records of and calculations performed by the CSU shall be conclusive evidence as between the Name and ERL in the absence of any manifest error..."

7.

In his persistent but always courteous submissions in response to the application, Mr. Tropp made a large number of points which Mr. Yeo consistently for his part with his duty towards an unrepresented opponent, helpfully summarised as follows. There were, said Mr. Yeo, eight categories of alleged manifest error to be extracted from Mr. Tropp's submissions.

"(a) MSU determination outside 'intention of parties'..."

(b) AUA 9 had no authority to act for D...

(c) Settlement...

(d) Inclusion of all of his losses in APH syndicates...

- (e) Failure to include specific 'credits'...
 - (i) Share of syndicate assets
 - (ii) Profits from syndicates.
 - (iii) PSL proceeds actual and accrued...
- (f) Failure to include other more general credits arising from alleged misrepresentations, failure to regulate/investigate/claw back...
- (g) Title to sue...
- (h) Variation in reported total RITC debts..."

8. It is appropriate to say a little more about certain of the themes developed by Mr. Tropp in oral argument and drawn from this rather more global summary.

First, submitted Mr. Tropp, he had entered into an oral settlement agreement with Lloyd's. This agreement had been entered into orally between Mr. Tropp and Mr. Ron Sandler, then Lloyd's Chief Executive, on or about 24th/25th March 1997. The terms of the agreement were that

- (1) Mr. Tropp would pay \$5,000 in full and final settlement of his obligations.
- (2) Mr. Tropp would sign a full release for Lloyd's and all other parties concerned.
- (3) The "old" form of individual settlement agreement would be used, which did not require Mr. Tropp to acknowledge the debt due from him had there been no settlement, a figure necessarily substantially in excess of the settlement figure.

9. Secondly, the syndicates had not been undertaking insurance and Reinsurance business in the years in question, they had simply been carrying forward balance sheet losses from previous years when Mr. Tropp had not been a name on the syndicate or syndicates in question. Against this background, the calculation of the premium due from him was outwith the intention of the parties and/or there was manifest error. Manifest error, as was common ground, depended on contractual interpretation.

10. Thirdly, Mr. Tropp emphasised that he had no history as a litigating name. He did not wish to unwind the R & R scheme or the Reinsurance contract as a whole. He only

wished to unwind a few syndicate outcomes. He had, he said, been placed in the wrong syndicates. He had given instructions that he should not be placed into the APH syndicates.

11. Fourthly, Lloyd's had no title to sue. It claimed as an assignee but had already recovered the amount secured by the assignment of the RITC debts.
12. Fifthly, Mr. Tropp had sought to resign in order to avoid being a name on the 1991 year, but wrongfully his Member's Agent had failed to give effect to his resignation. Lloyd's was answerable for that failure.
13. Sixthly, his syndicate reserves had been depleted, thereby inflating the premium set to be due from him.
14. Seventhly, against this background, summary judgment should be refused. All the more so when Mr. Tropp's numerous requests under Part 18 and Part 31 were taken into consideration. The information and documents which he sought and which it is unnecessary to set out here would shed light on the matters already summarised. Summary judgment should not be ordered without giving him at least the opportunity of obtaining such material.
15. Mr. Tropp added that he had placed before the court the most evocative items, as he put it, of the evidence in the case, but these were, he said, specimens or examples and, were the matter to go to trial, there would be more.
16. In my judgment the context of the present dispute and the applicable legal framework may be summarised as follows:

(1) It is necessary to distinguish sharply between the position of Lloyd's and the position of an individual Name's Managing Agents and Members' Agents. In particular, as to Managing Agents in *Lloyds v Clementson* [1995] 1 Lloyds Rep. IR 307, page 330, Steyn LJ (as he then was) said this:

"... the name relies on and assumes the risk of the honesty and skill of his managing agent. Manifestly in the Lloyds system there is no assumption of responsibility by Lloyds to supervise the investment or underwriting decisions of managing agents. That does not mean that Lloyds has a licence to act in bad faith for improper purposes or otherwise in an unlawful manner, but that merely means that such action would be *ultra vires*."

(2) The R & R scheme was both complex and fundamental to Lloyd's' ability to address the crisis facing the market by the early 1990s. The history has been set out very fully in previous decisions. For example, in *Leighs* (Colman J) at pages 761-2 and in *Fraser* (Court of Appeal) at pages 1634 and following. It suffices to set out here an extract from the Court of Appeal judgment in *Fraser* at pp 1635-6.

"By 1991 or 1992 it had become clear that the market was in a state of crisis. There was a risk that the claims which would be made upon Names or were outstanding were liable to overwhelm the resources of some of them. The Reinsurance structures within the market were themselves unlikely to be able fully to protect Names against their liabilities. Syndicates were finding it impossible to close certain years. Reinsurance to close was impractical or unavailable. This serious situation had substantially come about because of one or more of the various matters to which we have previously referred, but whatever their causes the difficulties for the market and all those involved in it require to be addressed and the Society had of necessity to look for solutions and seek to provide remedies - the 'R & R' scheme. The measures adopted involved the Society using its byelaw making powers. It effectively introduced a compulsory Reinsurance and Run-Off scheme. It was put to the members of the Society in 1996. An extremely lengthy and complex offer document was published. Those who signify their assent to and willingness to co-operate with the proposal had the advantage of various financial arrangements which whilst not affecting their ultimate liability facilitated their discharge of it.

Those who did not accept the proposal, the non-accepting Names, were nevertheless required to Run-Off their outstanding liabilities in accordance with the reconstruction scheme and reinsure them as provided for in the 'Equitas' Reinsurance contract which was an essential part of the scheme. This contract provided a method whereby a single legal entity of assured ability and willingness to discharge the insurance liabilities of Names to those who had placed insurances in the Lloyds market from outside (as well as from inside the market) could do so in an orderly and assured fashion. Part of this Reinsurance scheme, which was effectively a Reinsurance to close, required the individual Names to pay a Reinsurance premium to Equitas which corresponded

to an assessment of each name's outstanding liabilities accrued in the future down to the end of 1992. The contract or related contracts had also to make provision for the orderly application of the assets of the individual Names within the market, including their assets held by or formally held by their managing agents, their existing Reinsurance contracts, their various trust funds and deposits and the litigation fund which had resulted from the successful litigation of groups of Names against those who had culpably not discharged their duty of safeguarding the interests of Names. It was in the treatment of such assets that the settlement document primarily distinguished between those who accepted the scheme and those who did not."

It is by now beyond argument that the R & R scheme and the Reinsurance contract were both validly entered into.

(3) The provisions of clause 5.10 are eminently understandable against the background of the R & R scheme. I can do no better than to respectfully refer to and adopt the observations in this regard of Hobhouse LJ, as he then was, in *Fraser* at pages 1658-9 and Colman J in *Price* at pp 465-7 and 459. It is again necessary to read what they said. Hobhouse LJ said this:

"Clause 5.10 is drafted in comprehensive terms. It is not an unusual type of clause and is in principle appropriate to this contract. If as discussed in the preceding parts of this judgment... the applicants had been able to show that the Society or Equitas or CSU (now MSU) had misconstrued the contract, then it would have followed that the calculations would have had to have been reopened. But that is not the case. The records of and calculations performed by MSU are to be conclusive evidence of the amount of the name's premium as set out in Clause 5.1(b) and the amount by which it has been discharged by the transfer of assets or other sums realised, save for any manifest error. The calculations have been produced together with the figures upon which they are based derived from the records of the CSU. The exercise has been a highly complex one. It has necessitated the CSU in collecting and collating the figures from each syndicate of which the given name was at any material time a member. The resultant calculations led to the assessment of a Reinsurance premium which the name is required to pay under Clause 5.

The first argument of the applicants was that they were entitled to inspect and check the accuracy of the records in the possession of the MSU and the figures

derived from them. This submission involved a contradiction of both the express wording and clear intention of Clause 5.10. The MSU was the body which was charged with the responsibility for undertaking that task and it is the fruits of their work that are to be taken for the purposes of settling the liability of the name for his Reinsurance premium under Clause 5. It was argued that it was impossible to tell whether there was any 'manifest error' in the figures unless such an investigation was carried out. This too was a contradiction of the provisions of this clause. The figures are to be taken as correct unless in their own terms they manifestly cannot be correct or if the name by pointing to some other piece of evidence can demonstrate that they clearly cannot be correct in some respect. It is for the name to identify and demonstrate some clear error. The applicants who are relying upon this point have not shown any arguable case that they are able to do this.

It will be appreciated from what we have said that we have not accepted one of the arguments put forward by counsel for the Society, that only internal inconsistencies in the figures can be looked at for the purpose of showing manifest error. Had, for an example, a name been able to show clearly that another name's data had been used in place of his that would have sufficed to show at least a arguable case of manifest error..."

Colman J. said this:

"(i) The Reinsurance of the 1992 and prior underwriting years was fundamental to the R & R settlement scheme. The calculation of the Reinsurance premium was a matter of immense difficulty, not least because of the impact on market exposures of the LMX spiral. The reserving exercise necessary to calculate the global premium to be paid by the Lloyds market to Equitas was undertaken with great care and after taking comprehensive outside expert actuarial advice... The global figure thus arrived at was a consequence of a process of reserving by reference to the book of business of each syndicate and the part of the global premium attributed to each syndicate was derived from that syndicate's exposures. The members of the syndicate then became liable to pay what was called 'the Equitas additional premium' in accordance with the extent of their participation in the syndicate..."

(ii) The R & R scheme involved an offer being made to underwriting members of Lloyds which they were obliged

to accept by September 1996. Whether they accepted or not they were obliged to pay the Equitas premium. They had to pay their portion of those losses which had been identified as accruing to their syndicates up to 15th March 1996, including those attributable to 1993. If they had accepted Lloyds offer in consideration of waiving all claims against those involved in the underwriting in respect of the 1992 and prior years, they were entitled to what were termed 'debt credits'... The impact of these debt credits was to reduce the total amount of what would otherwise be payable to Lloyds by the member. Payment of the Equitas premium was to be made to Lloyds and not to Equitas because... Equitas had validly assigned the right to payment of the premium to Lloyds.

(iii) As part of the process leading up to the putting forward of the offer contained in the settlement offer document, Lloyds provided to each member an indicative finality statement in March 1996. This was based on syndicated declared results up to 31st December 1994. It showed an indicative or provisional calculation of the Equitas additional premium. Then in August 1996 Lloyds provided to each member a finality statement. This was based on the latest underwriting information and reserve figures in respect of each syndicate which had become available since preparation of the indicative finality statement. These were the figures by reference to which the underwriting members were to decide whether to accept the terms of the R & R settlement expressed in the settlement offer document. Again, it showed the amounts payable in respect of accrued losses and in respect of the Equitas additional premium.

(iv) Following the coming into operation of the R & R scheme, MSU sent out to all members an account notifying them of the amount which was due from each. If the member had accepted R & R debt credits should be shown. If the member had not accepted R & R these would not be shown and no deductions would be made on that account..."

The further passage which I must read from Colman J's judgment is this:

"Unless Mr. and Mrs Price can establish that there has been a *manifest*" --

and the word "*manifest*" is italicised in Colman J's judgment --

