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 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 form 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 as 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 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 --

"error in the records of and calculations performed by MSU, those calculations are conclusive evidence of their Equitas premium by reason of Clause 5.10 of the Reinsurance contract. In other words, they are precluded from going behind the stated figures unless they can show an arguable case that the figures are obviously wrong. This was decided by the Court of Appeal in *Fraser*... I would add that given the circumstances described in my judgment in *Leighs*, which gave rise to the calculation of the market reserves and the consequent Equitas premium, it is hardly surprising that the Reinsurance contract should have contained a provision directed to preventing Names from challenging Lloyds' calculations. The reserving operation was a matter of no little controversy and the whole commercial viability of the R & R settlement rested on the certainty of Lloyds' premium calculations. On analysis... the real substance of Mr. and Mrs Price's complaint is that something must have gone awry with the reserve and premium calculations for their syndicate and that is exactly the area of investigation which Clause 5.10 is designed to exclude..."

(4) As to the appropriateness of clause 5.5 and its impact I again have regard to the judgment of Hobhouse LJ in *Fraser*, where at page 1649 he said this:

"This was an R & R scheme within as has been held the powers of the Society. Clause 5.5 was an obviously appropriate part of the Reinsurance contract which was an essential part of that scheme. A no set-off clause is a standard type of clause... which is a standard clause found in Names agreements with their agents in Lloyds."

As *Leighs* made clear (CA at pp 1407-1408) this is so even if the claims against Lloyd's are claims in fraud.

(5) Names cannot rescind their membership of Lloyd's nor their underwriting commitments, even if they had been induced to take up membership as a result of negligent or fraudulent misrepresentations. That much is clear from *Leighs* and *Fraser*, both judgments of the Court of Appeal.

(6) Finally, it is plain beyond argument that Mr. Tropp was validly bound to the Reinsurance contract. See *Leighs* (again in the Court of Appeal) and the judgment which I gave on 20th January of this year dealing with an earlier aspect of these proceedings at paragraph 19.

17. I would add only this in connection with manifest error and the judgment of the Court of Appeal in *Fraser*. The concluding wording of Hobhouse LJ was emphatically not an

invitation to reopen the R & R scheme or the Reinsurance contract. The wording in Clause 5.10, "manifest error" and the linkage between those words and the prior wording "the records of and calculations performed", suggest that this clause necessarily has a relatively narrow meaning. It is certainly not an invitation to mount arguments based on the suggested inappropriateness of the underlying business of the syndicates or any anterior errors on the part, for instance, of Members' Agents in their conduct towards the name.

18. Against this background it is plain that most of Mr. Tropp's arguments are, with respect to him, hopeless and can be dismissed without further ado. Although at one stage it appeared that Mr. Tropp had a "wrong years" defence (that is, he was being charged for years when he was not on the syndicate or syndicates in question) on examination it became clear that his claim was not about that at all; it was a complaint about how the syndicates had been managed. But complaints about whether the Managing Agents were properly running the syndicate's business and whether such business was properly insurance or reinsurance business or, as Mr. Tropp put it, no business at all, do not lie against Lloyd's; even if they did, the most that they will do, given the provisions of the Reinsurance contract, is entitle Mr. Tropp to advance a counterclaim. They would not provide a defence, let alone a defence with a real prospect of success to this claim.

19. Likewise the allegation that Mr. Tropp had wrongly, whether innocently, negligently or fraudulently been placed on the wrong syndicates, discloses no arguable defence and no manifest error, even arguably. In like vein complaints as to the syndicates depletion of their reserves go nowhere. As Mr. Yeo put it, these it may have been said by Mr. Tropp, either amount to kick-backs or a triple profit commission. It matters not. If they were kick-backs and there was misconduct that, at the most, could ultimately give rise to a counterclaim. So far as a triple profit commission is concerned, the only evidence before me is that those were allowed for in terms of the R & R scheme and are, in any event, subject to adjustment. But even if that were wrong or the contrary was arguable, it would matter not at all.

20. Equally, it is plain that it is not now open to Mr. Tropp to unwind any of his commitments or to rescind his participation in any syndicates. Such rescission, upon which I have already dwelt, would involve detriment to third party policy holders. Other suggested defences would involve going behind the premium calculations in precisely the fashion precluded by the authorities to which I have already referred. To take one example, a point Mr. Tropp raised about records, as it seems to me it is plain that it is only

records produced for the purposes of the calculation in Clause 5.10 which are relevant in this regard. Otherwise one is back to the argument unsuccessfully advanced by Mr. and Mrs. Price in the case to which I have referred, that something must have gone awry.

21. So far as Mr. Tropp's resignation defence is concerned, that too, I regret, is hopeless. Once rescission goes out of the window then the most that can arise from a resignation defence is that there was a fault on the part of his Members' agents. On the face of it, any such claim does not lie against Lloyd's at all. But let it be assumed that it did, the proper avenue is by way of counterclaim.

22. 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 (in the case of monies due under personal stop loss insurance) not signing the necessary assignment form so as to lay his hands on the money. 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.)

23. 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."

24. 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.

25. I should add by way of some small comfort that so far as the PSL funds are concerned it would appear that the money is available to be credited against any sums due from Mr. Tropp to Lloyd's, provided only he signs the requisite assignment form. For clarifying that I am grateful for Mr. Yeo and those instructing him.

26. Still further in the light of all these matters, it is apparent that the provision of further information and disclosure in respect of the issues with which I have so far dealt would prove of no assistance to Mr. Tropp in resisting

the Lloyd's claim for summary judgment. For that reason it would not be appropriate to hold up the application for summary judgment pending the granting of such disclosure or further information if Mr. Tropp was otherwise entitled to it.

27. Lastly in this vein, as Mr. Tropp himself has said, what he has placed before the court are the most evocative examples of the matters of which he complains. It follows that if those provide no defences then other examples cannot realistically be said to assist.

28. In summary so far the proposed defences with which I have dealt either do not disclose any arguable complaint against Lloyd's or they fall foul of Clauses 5.5 or 5.10, at most they give rise to a counterclaim, or fail to disclose manifest error, or they are precluded by authority binding on me. That the scheme should be stringent and fairly narrow is hardly surprising. For Lloyd's to put together a settlement of this nature, as embodied in the R & R scheme, it was necessary to achieve certainty on the calculations of the Equitas premium and necessary to ensure that monies were paid without set-off or other deduction.

29. There remains the question of whether a settlement agreement was arguably entered into. As it seems to me, this issue requires closer examination. It is certainly clear that if there is an arguable defence of settlement then that would entitle Mr. Tropp to leave to defend and would result in, at least so far as the settlement question was concerned, the dismissal of the part 24 application.

30. The question of settlement is to be addressed in two periods. The first concerned, as I understand it, a period of, roughly, 8th November 1995 to 28th October 1996. Here, as I understood him, Mr. Tropp claims to have been strung along. It is not entirely clear whether he says that there was a settlement at this time. This period I should note does not concern Mr. Sandler at all. As it seems to me, anything short of an allegation of settlement would not assist Mr. Tropp, but in respect of this episode any allegation of settlement is hopeless. I need only read from one letter and that is Mr. Tropp's own letter of the 16th November 1995, to a Mr. Harboard-Hamond of Mr. Tropp's Members' Agents:

> "You will be aware that last week financial recovery and I had reached agreement in principle on a settlement, nonetheless the documentation remains to be drafted (by the Society's counsel) and executed by both sides. I am hopeful that this will occur, but pending the moment of mutual execution settlement has not yet happened. In contemplation of the possibility that it

yet may not, it is only prudent that I continue with measures to establish the readiness to execute instead on some serious unpleasantness should our agreement not go to documentation within the next couple of weeks."

31. It is plain from that passage that Mr. Tropp himself did not for a moment think there had been a settlement and it is also plain from the final lines of that passage that Mr. Tropp, although hoping that there would be a settlement, was gearing himself up to take such action as he thought appropriate to guard against the possibility that it might not happen. This period does not therefore assist Mr. Tropp at all, but it may be relevant to the matters next to be considered because of the emphasis, understood by both parties, on the need for a settlement agreement to be in writing.

32. With regard to the alleged settlement agreement of the 24th or the 25th March 1997, it is pertinent to pull together a number of documentary exchanges. I start with the Lloyd's' internal memorandum from Mr. Sandler to Mr. Holden of 25th March 1997, on which Mr. Tropp placed considerable reliance. The memorandum reads as follows:

> "I spoke last night to Rick Tropp. He is prepared to pay $5,000 in full and final settlement of his obligations. He understands that his funds at Lloyds either have been or will be drawn down. I told him that this offer was acceptable and that you would be in contact with him immediately in order to finalise the necessary legal arrangements. He is quite happy to sign a full release but is concerned that he is not called upon to acknowledge the gross total of his obligations. I assured him that we would not issue a writ against him whilst this process was being finalised, subject, of course, to the length of process being reasonable."

33. On 1st April 1997 a Mr. Meeson, an assistant manager in the financial recovery department, wrote to Mr. Tropp. He said this:

> "It has been brought to my attention that you have recently been in communication with the chief executive. I have been informed of the terms of your agreement and will now put that in place with our lawyers with instructions that the various documents should be sent to you as a matter of urgency..."

34. On 14th May 1997 Mr. Meeson sent a further letter to Mr. Tropp. In this he said that he had still not received the paperwork from the lawyers, but said that

he had not forgotten the matter and would revert as soon as possible.

35. On September 30th 1997 Mr. Tropp wrote to Mr. Sandler, saying, amongst other things, the following:

> "Your people obviously are not following through on their April and May promise of draft settlement language..."

36. On 19th May 1998 Mr. Coldbeck now, of the financial recovery department, wrote to Mr. Tropp and he said this:

> "I understand that you met with Michael Meeson recently, who requested that I write to you regarding the possibility of a settlement with Lloyds. As I understand it, a settlement has been agreed in principle, whereby you will pay to Lloyds $5,000 in settlement of your liabilities and enter into an individual Names settlement agreement. In this regard I have to say that the agreement is still in the process of being drafted. Nevertheless, I am enclosing a copy of the latest draft of that agreement for your information, but must stress that as yet it is a draft only. When the agreement has been finalised I will send you a copy for execution, but in the meantime if you have any queries please give me a call."

37. On 9th July 1998 Mr. Holden, the head of the financial recovery department, wrote to Mr. Tropp in a letter headed "Subject to contract." He said, amongst other things, this:

> "I can assure you that our records reflect the agreement made, being that subject to you completing the individual settlement agreement (a copy of which will be sent to you in due course) a payment of $5,000 will be accepted in full and final settlement of your Lloyds liabilities..."

He suggested that the draft agreement would be available shortly thereafter.

38. On 16th November 1998 a further letter was sent from a Miss Singleton in the financial recovery department suggesting a draft form of agreement. Again this was headed "Subject to contract."

39. On 29th November 1998 Mr. Tropp wrote again to Mr. Sandler objecting to the standard form of agreement which had now been sent to him and in particular raising objection to the inclusion in that form of an acknowledgment of debt. Mr. Tropp said this:

> "At the most fundamental level were I to sign on to this I would be signing what I know to be untrue. I simply do not sign untruths. You will moreover recognise Clause 7.2 *inter alia* as being inconsistent with our discussion of March 97. The upshot of our discussion was that we agreed in principle on an individual settlement agreement in which Equitas was (we discussed this and you reassured me on it) explicitly to play no part. This ISA was rather to be a non-contingent 'full and final' resolution and parting between Lloyds - not Equitas - and me. It was to be closure with, if you will, finality."

On 19th May 1999 Mr. Tropp wrote to Miss Singleton. He said this:

> "Lloyds offered me in March 1997 an individual settlement agreement and I accepted. My acceptance and the discussion with Lloyds that led up to it was expressly premised on Lloyds assurance that I would not be required to acknowledge what the R & R finality statement had represented as 'my' 'debt' which I believe it not to be. This assurance by Lloyds was the fundamental predicate in reliance on which I agreed in principle with Lloyds at that time to settle. It was expressly understood on your side that this was the underlying context of our discussion and that I would not have agreed to settle absent Lloyd's dispositive assurance on this basic point... An 'individual' settlement agreement is what the term 'individual' suggests. One that is negotiated in its essentials satisfying both parties. This is what I agreed to and what your institution agreed to. The 'standard' agreement you now push me to sign is an oxymoron when considered together with the 'individual' one to which Lloyds agreed. The standard agreement is not a fulfillment of Lloyds' word given to me, but rather would be an unseemly reneging on the institution's word..."

40. On November 30th 1998 Mr. Tropp wrote again to Mr. Sandler. He was complaining of the stance then taken by Mr. Holden and Mr. Tropp summarised his complaint as follows:

> "In a word he will not keep the in-principle bargain which you and struck over one and a half year's ago, and indeed he professes ignorance of it."

41. There then follows a note made by Mr. Sandler himself to Mr. Holden. There was some debate about the correct dating of that note. I cannot for today's purposes

resolve it, but fortunately the date does not matter. It said this, commenting on a further document received from Mr. Tropp:

> "For the record I have <u>never</u> discussed with Rick the specifics of any settlement (other than the amount) and have not reached an 'in principle agreement' regarding the substance/wording of any settlement.... He has referred repeatedly in the past to his 'counter-measures' which he now plans to activate. Interesting to see what they will be!"

42. Nearly finally, on the 2nd March 2000 there was a still further letter from Mr. Tropp to Mr. Holden. He said he had been taken aback by the stance taken by Mr. Holden. He, that is Mr. Tropp, was simply intent on implementing the substance of the agreement which he said he had. He said further that if Mr. Holden was now refusing to proceed with him then Lloyd's would be reneging on an agreement its chief executive had made. He continued:

> "This would put Lloyds into the position of being in breach of contract with me after a teasing almost three years of having led me on to believe that you would execute on an ISA - three years during which in detrimental reliance on Lloyds word I have foregone pursuing available remedies to get recovery."

43. Subsequently Mr. Tropp himself drafted the terms for an individual settlement agreement. It was not a particularly short document; it was single spaced and some three pages long.

44. Finally in this chunk of correspondence or exchanges, on the 2nd March 2000 Mr. Holden wrote to Mr. Tropp thanking him for his letter of 27th February enclosing Mr. Tropp's version of an individual settlement agreement. Mr. Holden continued as follows:

> "You have been advised on numerous occasions that the standard agreement with a non-accepting name (the agreement) is not open to negotiation or amendment, although I did agree to a minor amendment to the agreement during our telephone conversation of 15th December 1999, which was a concession to you alone. Accordingly, the version of the agreement that you have submitted is unacceptable to Lloyds. As it would appear that you are not prepared to execute the agreement in its present format, the offer of settlement is now withdrawn and Lloyds will pursue such action as it deems appropriate to recover the amount of your gross liability together with interest and costs

thereto. I appreciate that this is not the response that you would have wished for, however matters cannot be left in abeyance indefinitely."

45. There was no statement from Mr. Sandler himself, apart from the note to which I have referred, but on his behalf Lloyd's deny that he had given any undertaking as to the form on which any settlement would be concluded.

46. Unfortunately, though the parties were within a whisker of settlement, they ultimately drew further apart. That is a matter much to be regretted, though it is not for me to assign blame and indeed I am not in a position to do so. The sticking point, as it appears, was the question of an acknowledgment of debt. The "old" ISA contained no such provision, the later form did. Mr. Tropp told me that he would not sign an agreement containing such an acknowledgment

(1) Because he would be liable to tax or might be on the difference between the settlement figure and the acknowledgment of debt figure. He was apprehensive of the view which the United States IRS would or might take.

(2) Because it was morally wrong to acknowledge liability when he did not think he was liable.

(3) Because in the event of Equitas failing he would be admitting liability in that figure in the event of any future claims against Names.

47. However, Mr. Tropp argued that Mr. Sandler had committed Lloyd's to a settlement on the old form. Lloyd's and Mr. Sandler were mistaken when they sought to say that he had not entered into any such commitment and had simply noted Mr. Tropp's concern. In short, Mr. Tropp said there had been an immediately binding oral settlement agreement in March 1997 on terms, amongst other things, that the old form would be used.

48. Although, as foreshadowed, this suggested defence did require closer examination, ultimately the position certainly as to the principal sum is clear beyond realistic argument to the contrary. I would not have been minded to give summary judgment if the matter hinged on the disputed question of what Mr. Sandler had said, whether he gave an assurance that the old form should be used or whether he simply acknowledged Mr. Tropp's concern. That, had it mattered, would plainly have been a triable issue. Instead I make the assumption most favourable to Mr. Tropp that Mr. Sandler did give the assurance for which he contends, namely, a settlement would be entered into on the old form without an acknowledgment of

debt.

49. Here, as it seems to me, Mr. Tropp's argument begins to break down. Even assuming such an assurance had been given, it would not help Mr. Tropp unless it could be said that there was a real prospect of contending for an immediately binding oral settlement agreement. But to my mind any such contention is fanciful. The reasons why there cannot even arguably have been an oral settlement are overwhelming.

50. First, there is the history of the previous episode of settlement negotiations. It is clear from those, not least in the letter written by Mr. Tropp himself, that the emphasis was on achieving a written settlement agreement. There was no intention to conclude an oral settlement agreement.

51. Secondly, it is simply inherently implausible, to the extent of being fanciful, that in this context there would have been an oral settlement agreement or that both parties intended to agree one. There is the complexity of the matter, there is the question of assignments and recoveries and there is the question of the involvement of third parties in any release. It is of course true that parties sometimes make mistakes and achieve an agreement where either one or both does not realise that such has been done, but I do not think, even arguably, that that situation arises here.

52. Thirdly, there is the question of language used in the lengthy exchange of materials which I have read. Those exchanges talk of a process of settlement, of draft settlement language, of agreement in principle, of agreements being subject to contract and of full drafts having been submitted. The language is redolent, if I may say so, of parties whose clear intention is only to enter into a binding agreement when there has been a written document properly executed.

53. Fourthly, so far as the old form itself goes, it is apparent from the way in which Mr. Tropp puts his suggested settlement agreement that it was not a case of simply incorporating the ISA lock, stock and barrel into the agreement. It was a question of addressing the old form ISA as part of the settlement process. Mr. Tropp very fairly said that he was not anticipating the old form word for word, but from his discussions with Mr. Sandler was expecting substantially if not exactly that. But as it seems to me, even taken at its most favourable, the parties must have been contemplating further negotiations on the precise wording of the old form with regard to what would finally enter into a settlement agreement.

54. Fifthly, the context was that of the R & R scheme. Oral agreements of settlement in that context would be a recipe for chaos and nothing in Mr. Tropp's contemporaneous communications suggested that even he thought otherwise. It is a feature of the exchanges that it is only much later that Mr. Tropp talks of an agreement or a breach of contract. In the earlier exchanges he is talking of no more than an agreement in principle and looking for draft settlement language.

55. For completeness, nothing less than an immediately binding oral settlement agreement can assist Mr. Tropp. Anything less than that could, in my judgment, amount to no more than a non-binding agreement to agree. Alternatively, viewed as some sort of estoppel, it would entail achieving the same effect as a settlement agreement using estoppel impermissibly as a sword rather than a shield.

56. Finally in this regard, there is the question of Mr. Tropp saying that he relied on assurances and did not pursue other recoveries. I am bound to say, with respect, that I regard this as fanciful. First of all, as it seems to me, there is not even arguably a clear representation upon which he can rely. If, necessarily on this hypothesis, there was no binding agreement, then at the very most there was a suggestion of negotiations. Again, as it seems to me, and as Mr. Tropp well knew, those negotiations might or might not come to fruition. Secondly, it is fanciful to suggest that there was reliance. Going right back to the first episode in the settlement discussions, Mr. Tropp had made it clear that against the risk of settlement negotiations ultimately failing he was keeping his powder dry. I can see no reason, even arguably, against that background why the position should later on have been any different. In any event, it is plain that by 16th November 1998 when a different form of draft had been sent to him from that which he says he was expecting, it would have been clear to him that he could no longer rely on receiving some other form of agreement.

57. Ultimately, as it seems to me, on this matter the choice lies between an agreement subject to a contract necessarily in writing, or an immediately binding agreement with the writing only a formality. That question answers itself; only the former is a realistic candidate. In the circumstances there is, therefore, no useful purpose in ordering disclosure, or further information, or requiring Mr. Sandler to attend to be cross-examined. In short, the defence of settlement, subject only to the question of interest, with which I still have to deal, is not fit to go to trial.

58. The final matter is the question of interest. The point here is this: Mr. Sandler recorded the position on 25th

March 1997 on the basis that no writ would be issued until the "process was finalised". As it seems to me, the process was not "finalised" until 2nd March 2000. What then of the question of interest? Mr. Tropp's submission was succinct. There was no question of a claim until the process was finalised. There was, he said, no question of any interest from before that date. In short, interest was not to run until after 2nd March 2000.

59. Mr. Yeo's response was equally succinct. Lloyd's had been kept out of its money. The suggestion that no writ would be issued until the settlement process had been finalised was a common sense and sensible measure while negotiations were continuing. If negotiations succeeded, all well and good. If they did not, all bets were off. Lloyd's was entitled to interest as claimed.

60. I prefer Mr. Yeo's argument. It seems to me that the very sensible interregnum while settlement discussions were underway was no more than that. If settlement was not achieved then there is no reason why Lloyd's should be kept out of the interest due on the debt which it is seeking to recover.

61. I add only this. Mr. Tropp asked that I should not enter judgment because of the adverse impact it would have on what I may respectfully term his good works in the developing world. I am not sure for my part why that should be so, but even assuming that it is, that cannot be a reason on which it could be right to condemn both the parties to a trial on issues on which Mr. Tropp has no arguable prospects of success.

62. I accordingly decide that summary judgment should be given to Lloyd's for the principal sum plus interest as claimed. I shall look to Mr. Yeo, to whom I have been immensely grateful for his thorough and fair presentation, to draw up the order and explain it to Mr. Tropp.

63. *Postscript:* After the hearing, I received a lengthy letter (or submission) from Mr. Tropp, dated 9th June, 2004, together with attached schedules. Mr. Tropp invited me "to reconsider and vary" certain matters in the above judgment. Save to say that (1) I have had careful regard to this material and (2) with respect, I am not persuaded to make any variation to the judgment in the light of it, no further comment is called for.