Appellant's Notice Annex 2 -- Section 7: Grounds for Appeal

I. **Strikeout court wrongly applied § 14(3) of Lloyd's Act 1982 as precluding not only the remedy of damages but also of specific performance, but § 14(3) does not immunise Lloyd's from and is not engaged by claims for specific performance**

1. Appellant's counterclaim in his Defence and Counterclaim of 14 May 2004 ("Counterclaim") asked at §§ 40(a)-(g) for remedies in specific performance on the contract between Lloyd's and him, and on Lloyd's' obligations under its statutes the Lloyd's Acts 1871-1982....

5. § 14(3) does not on its face exempt Lloyd's from claims in, nor immunise it from remedies in, specific performance....

7. (c) The strikeout was not justified in the public interest... because contrary to the public policy justification in this Court's and the Comm Ct's R&R holdings, none of the proceeds of the R&R litigation are destined for Equitas's insurance reserves to protect policyholders and cover claims.... Under the R&R assignment of the "RITC Debts" to Lloyd's by Equitas, **100%** of the proceeds of Lloyd's' R&R claims, including the one against Appellant, have been converted to the benefit of the Corporation of Lloyd's itself, as a windfall....

II. **Strikeout court wrongly relied on Lloyd's' § 14(3) immunity to preclude the counterclaims: § 14(3) was enacted to cover Lloyd's' "public functions" in an HRA sense, but Lloyd's is not immunised by § 14(3) in its merely private acts....**

17. In Appellant's particular case, Lloyd's itself pleaded that its acts in question were **not** in its regulatory or supervisory capacity, and the court relied on this submission for its strikeout judgment:

In pleading for strikeout, Lloyd's relied on a submission that as to the matters in Appellant's counterclaim, Lloyd's was under no regulatory or supervisory duty (outline submissions at §§ 9, 10, 13(b)). Lloyd's expressly relied on this Court's quotation in **West** of dictum from an earlier case, applying this Court's point to the matter of Appellant's counterclaim: "'Lloyd's is not a public law body which regulates the insurance market.'" (id at § 10, **West** at paras 17, 30). This follows Lloyd's' earlier submissions (witness statement in support of strikeout at § 5, quoting and relying on **Lloyd's v Clementson** [1995] 1 LRLR 307, at 330 col 1-2; Defence to Counterclaim at § 5).

Lloyd's also denied, in relation in particular to the matters in the counterclaim, "that Lloyd's has any public law duty of accounting as alleged or at all" (Defence to Counterclaim at § 13(a)). If the matters in the counterclaim **were** ones arising from Lloyd's' public functions, then under the line of authorities relied on in this Court's analysis in **West** (cf. at § 34 citing Lord Woolf's public functions tests in **Poplar Housing Assoc. v Donoghue** [2001] EWCA Civ 595 at §§ 65-66), the remedy of accounting and other public law remedies must and would apply (Appellant's strikeout skeleton at § 65). In denying having any public law duty of accounting as to the matters in the counterclaim, Lloyd's ergo was saying and relying on a defence that those matters were not done in its public functions capacity.

The Part 3.4 hearing court took Lloyd's at its multiply pleaded word on this point, and relied on these submissions in the strikeout judgment (at §§ 10, 14). The court quoted at length from and relied on Lloyd's' invocation of the points in **West** at para 17, on the basis of which judicial review had been refused of Lloyd's' acts, including (in particular) relying on that prior dictum that "Lloyd's is not a public law body which regulates the insurance market".

18. **If no judicial review lies of Lloyd's' R&R acts and claims on the ground expressly that they are not public functions, and Lloyd's itself relied in pleading to Appellant's counterclaim that the matters in it do not engage Lloyd's' public law duties, then its § 14(3) immunity cannot be engaged to shut out the claims in the counterclaim**.

It was wrong for the Part 3.4 court to allow Lloyd's to hide behind § 14(3) to preclude Appellant's R&R counterclaim, and thus to evade scrutiny of its R&R acts done (as Lloyd's itself has pleaded, and the court has relied on in its judgment) in its merely private capacity.

The broader policy point of general interest is that Lloyd's has been able to have its proverbial cake and eat it too, and the courts have not attended to the inconsistency: "**private** functions" in the Admin Ct and in this Court's review of the Admin Ct judicial review cases, for purposes of escaping judicial review and evading justiciability under the ECHR and HRA, with the effect of denying the protections and disciplines both of judicial review and of the ECHR and HRA to R&R litigation defendants as a class; but "**public** functions" by imputation in the R&R cases in the Comm Ct and this Court on appeal from it, for purposes of the courts' deferring to Lloyd's' R&R byelaws as carrying the statutory authority of subordinate legislation.

The consequence of the latter has been, in defence, the preclusion on summary judgment of all defences which otherwise might have been open to R&R defendants under common law and equity, and under other statutes generally applicable to everyone else in the insurance market and the broader commercial market, such as general Companies Law and the Financial Services and Markets Act ("FSMA") and predecessor insurance regulatory statutes. Now the consequence of the Comm Ct's reliance on Lloyd's' § 14(3) immunity in striking out Appellant's counterclaim is to similarly preclude -- to shut out -- counterclaims under the general laws of insurance and of contract (whether in common law, equity or even statutory) which would, absent § 14(3), seemimgly be open to **anyone** else **except** a defendant in an R&R case....

III. Court's reliance on § 14(3) for strikeout wrongly shut out Appellant's rights and remedies in the English law of insurance, which is engaged as to him as an underwriter even if § 14(3) does apply in Lloyd's' merely private capacity, and which cannot be precluded by the application of § 14(3)

24. In reliance on § 14(3), the Comm Ct struck out Appellant's counterclaims under statutory general insurance law and the settled common law on when insurance claims -- not the contract, but particular claims -- may be avoided for non-disclosure and misrepresentation.

The Comm Ct wrongly adopted Lloyd's' disingenuous characterization of such defences as unbecomingly seeking rescission of the whole under-

lying contract (see § 2 above). In doing so, the Ct wrongly followed the Part 24 judgment at § 20. (See, on earlier appeal from that, Appellant's Jolly v Jay answer submission of 26 Oct 2004 at § 8 on this straw man and why it was not on point with his then-defences, as opposed to here counterclaims, under the general UK law of insurance.)

This Court in its earlier hearing on permission to appeal from the Part 24 judgment did not consider Appellant's then-pleading of these defences as a class, without reasoning on why it declined to do so. (See on those defences Part 24 skeleton argument of 18 May 2004 in opposition to summary judgment ["Defence argument"] §§ 16, 37, 38; and Appellant's Supplemental Skeleton Argument of 28 Oct 2004 to this Court at §§ 1-34, beginning under head "Defences under general law of insurance, and leading authority [under that law], brushed aside...")

25. The further shutting out of Appellant's rights and remedies under the English law of insurance now in counterclaim is especially unjust in substance, and unfair in process, because he as an individual is subject to the Financial Services and Markets Act 2000 ("FSMA"), not only under Part XIX ("Lloyd's") but also under all the other parts of FSMA which impose obligations on underwriters as a general class. As to bearing all FSMA obligations, he is considered to be a regulated underwriter under UK law (which resignation from, or settlement with, Lloyd's does not escape or change). (Appellant's strikeout reconsideration letter § 5, head "Remedies available to all other regulated underwriters under general insurance law overridden by sec. 14(3)?").

N.b., in FSMA §§ 320-322 on Lloyd's "Former underwriting members", that "The Authority [FSA] may impose on a former underwriting member such requirements as appear to it to be appropriate for... protecting policy-holders against the risk that he may not be able to meet his liabilities" [§ 320(3)]. These include freezing assets and taking control of them, just as FSA can with a large corporate insurer whom it anticipates might, from a holding company, try to asset-strip an insurance subsidiary when it is projected to become insolvent, before it actually does. Lloyd's can upend Appellant's life under FSMA's statutory insurance regulation scheme at any time Lloyd's chooses to and can convince FSA that it is prudent to let it do so; he bears, as an individual, the exposure of a regulated underwriter without end.

It is within this FSMA context that Appellant pleaded (strikeout skeleton at § 145) that all causes of action which are available to any other underwriter regulated under general UK insurance law (**n.b.** esp. skeleton §§ 124, 126, 128, and 129) must symmetrically (a fortiori, the more so as he is a vulnerable individual underwriter, compared to a big corporate one) be available to him for the counterclaim. Conversely, he also pleaded that all remedies available to any other reinsured underwriter claiming as an assured against its reinsurer must be available to him in his capacity as an assured under R&R.

If not, then the Appellant's bearing in law the standard FSMA regulatory obligations and liabilities -- and in particular, his being subject to having his assets placed under administration in the event of a projected capital inadequacy at Equitas, exactly as a big corporate insurer can be if it is anticipated to be heading toward regulatory capital inadequacy -- would, without his having the corresponding reciprocal rights and remedies under the same law, be facially unjust.

26. As to Appellant's capacity as an assured who was reinsured in R&R, and whether he has the rights of all other assureds under UK law against their reinsurer (and if not the same, against the party which solicited them to the reinsurance contract or mandatorily bound them to it), Lloyd's pleaded that "Lloyd's do not have any obligations in respect of him being a policyholder of Equitas" (strikeout reply witness statement of 2 Sept 2004 [Fourth of Mr. Martin] at § 4) under the general insurance law. Lloyd's submitted that his capacity as an insured policy-holder under R&R (to which capacity Lloyd's admitted) was, in English law, a mere "sub-set" of his capacity as a Name; ergo he had no remedies under the UK law of insurance which protects all (other) assureds in the UK (Defence to Counterclaim at § 13(b)(ii)).

The court cited and expressly accepted Lloyd's' submission that Appellant's capacity as an assured is, in English law, a mere "sub-set" of his being a member of Lloyd's; "They are not distinct categories or capacities; the latter [his capacities as an assured in Equitas] ... are subsets of the former [as a Name].... He is therefore a policyholder **in** his capacity as a Name." (strikeout judgment at § 16).

The effect of this holding is to establish that the rights and remedies under the centuries-old English law of insurance which protects assureds in general are, uniquely, not available to a disadvantaged class of Lloyd's members in their capacity as assureds (and not even when they had been made assureds by being **mandatorily** reinsured).

In reliance on that "subsets" argument which the court accepted, Lloyd's pleaded § 14(3) as overriding, as to **all** Appellant's remedies sought in counterclaim, the UK's general law of insurance. Lloyd's simply ignored, without rebutting, his points on rights and remedies which not only assureds but also underwriters have under that law (strikeout skeleton §§ 85, 114-146). The court relied on Lloyd's' "subsets" point as the court's basis for accepting such overriding effect of § 14(3), holding (strikeout judgment § 16) by inference that § 14(3) preempts all protections he otherwise would have had (in his capacity as an underwriter, not only in its converse as an R&R assured) under the law of insurance which applies to all other underwriters who chose to do business under the protection of UK law.

27. This on its face is a manifest injustice by comparison to the remedies available to all other UK underwriters, including corporates who bear no more than the same regulatory burdens and liabilities that Appellant as an individual does, but who reciprocally have protections under the UK's law of insurance which **he** now has been held not to have (and who can dissolve as companies to ultimately escape perpetual regulatory oversight and endless vulnerability to asset seizure, when he cannot). This is an establishment of a special class of underwriter disadvantaged in law, in the protections given them by the law, relative to all others who are similarly regulated.

Such discrimination -- a fortiori, as to individuals versus big corporates -- cannot be consistent with the policy of the law which regulates underwriters who carry duties and bear burdens under FSMA, nor with the policy of the broader law regulating UK financial markets...

Convention [Euro human rights] points engaged by issue III

29. Protocol 1 article 1 [right to protection of possessions]:....

30. Article 6 [right of access to court, fair hearing]: ...Art. 6 is engaged by the strikeout court's shutout of Appellant from his claims under the general English law of insurance, which establishes rights in domestic UK law that protect all underwriters who submit to the UK jurisdiction in reliance on its law of insurance, in reciprocity for the liabilities to which they become subject under that law.

31. Article 13 [right of 'practical and effective' remedy]: (a)... Appellant was deprived by the strikeout of his remedies under UK insurance law,...on which he had centrally relied in his counterclaim (strikeout skeleton §§ 85, 114-146). (See § 77 below especially, on remedies under **Manifest Shipping v Uni-Polaris & Ors** [2001] UKHL 1.)

(b) Lloyd's relied, in rebutting Appellant's points on deception in Lloyd's' solicitation of him to the R&R reinsurance, on an averment that the R&R Plan had been a "mandatory reinsurance", under and into which he had been "**mandatorily** reinsured" (strikeout reply statement at §§ 4, 6). [The argument was that he could not have been subject to a deceit in any solicitation because, Lloyd's represented to the court in contrast to what it had represented to UK and US regulators at the time of R&R, he was never solicited, merely forced into it.]

In an art. 13 context, this is an admission against interest: that Appellant had been denied **any** possibility of redress to wrongful acts in R&R as to him, including those aspects addressed in counterclaim §§ 40(a)-(g). It is a fortiori the more striking an unfairness that he now is further shut out from all practical and effective remedy by counterclaim under the UK law of insurance. Art. 13 must be engaged by the court's refusal of triability of his claims under that law.

32. Article 14 [right to be not made part of an unfairly disadvantaged class, put onto unequal footing by court]: Repeat here and replead § 9 above, as to protocol 1 art. 1; § 10(a) above, bringing in (as substantive rights in issue for the purpose of engaging art. 14) each... and all in combination of protocol 1 art. 1, art. 6(1), and art. 13....

VII. **Court was unjust in not granting permission to amend rather than striking out...; his sample fresh evidence was... enough to have made a threshold showing of arguability**

76. ...(as described in [Comm Ct] strikeout skeleton §§ 17, 19, 21-22, 51, 55, 116, and especially §§ 130 and 145), Appellant's sample evidence directly tracked and supported the various distinct points of breach of duty which he pleaded in the counterclaim, in support of the remedies in specific performance [he] sought in counterclaim §§ 40(a)-(g). Moreover, he described and pleaded by analogy in precise detail the multiple respects in which that evidence shows identities with core issues of fact and law which the Comm Ct previously had found triable in **Sphere Drake v Euro Intl, Stirling Cook Brown & Ors** [2003] EWHC 1636 (Comm) (discussion at id [strikeout skeleton] §§ 85, 131-145).

Appellant asked the Part 3.4 court, "If this [the multiple analogies and identities which he showed the court between **Sphere Drake** and his

case, issue by issue in id §§ 85 and 131-44] *was* triable material in **Sphere Drake**, should it not be so in the present case?" (id § 145).

77. Appellant had a formulated unifying legal theory, integrating those issues. That theory was deliberate avoidance, relying on lead authority of **Manifest Shipping v Uni-Polaris & Ors** [2001] UKHL 1 (id at §§ 121-130, head "Deliberate avoidance... is failure to meet insurance law utmost good faith duty of disclosure; claim voided").

The HL in **Manifest** held that the duty of utmost good faith in insurance is a continuing one after the insurance contract (rather than only in the inducement to contract, after which the duty is over), that this continuing duty is engaged in each particular claim, and that breach of such duty in any individual claim voids the claim as a matter of "the policy of the law" (**Manifest** at para 67 citing Lord Woolf elsewhere, relied on in Appellant's strikeout skeleton § 128).

The HL held breach of such continuing duty in a dishonest claim to be breach not only of duty in the insurance contract, but of a statutory duty as well under Marine Insurance Act § 17, entitling the insurer (not only in the common law, but also under statutory authority) to avoid the particular claim (op cit, **Manifest** at para 81).

The predicate in law for Appellant's reliance on this theory was that Lloyd's' claim was not only untrue in fact, as shown by his evidence, but was untrue in law as well, because the claim was for liabilities which did not meet the insurance law test of being "fortuity" [as opposed, in the English law of insurance, to an "inevitability"]. It therefore, in law, was not enforceably a claim of "insurance" at all (Appellant's strikeout skeleton §§ 117-120, under head "Liabilities were not in law 'insurance': not a fortuity, but inevitabilities...").

Lloyd's' claim against Appellant did not meet the test in the authorities on "fortuity" of being "insurance" in law, within the statutory meaning of either the Marine Insurance Act or the Lloyd's Act 1982. It was something else (see id §§ 134-35, on the **Sphere Drake** court's discussion of the characteristics of and lead authorities on pyramid schemes, colloquially "a Ponzi"), masquerading as an insurance claim.

Exactly as the HL instructed in **Manifest** -- in reliance on the HL's instruction, in combination with the "fortuity" authorities on when an insurance contract is "insurance" in law and thus enforceable -- Appellant sought the core remedy in **Manifest** (§ 31 above). This is not, as the HL in **Manifest** made clear, a remedy in rescission (the red herring in § 2 above) but its precise opposite: a remedy which is in reliance on, and continuing to honour, the underlying contract.

78. ...[The] court recognised... that in pleading in reliance on deliberate avoidance, Appellant **was** constructively pleading fraud, against the "fortuity" test of true insurance (judgment § 15)....

79. [I]n the US, pleading the counterpart to "deliberate avoidance", "conscious avoidance", is considered by courts to **be** constructively pleading fraud.... It was, e.g., on precisely the theory of conscious avoidance that the US District Court for the Southern District of New York recently presided over the conviction of the former CE of WorldCom in fraud, the largest corporate fraud ever (thus far)....