Society of Lloyd's v White and others
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
The Times 14 April 2000, 144 SJ LB 190, (Transcript)
HEARING-DATES: 3 MARCH 2000
3 MARCH 2000

COUNSEL:
M Brindle QC and D Houseman for the Claimant
PANEL: CRESSWELL J

JUDGMENTBY-1: CRESSWELL J

JUDGMENT-1:

CRESSWELL J: By application notice dated 11 February 2000 the claimant, the Society of Lloyd's ("Lloyd's"), seeks an interim anti-suit injunction against the defendants. The injunction sought is in these terms: Each of the defendants, whether acting by himself/herself or by his/her legal or personal representatives or successors, be restrained until judgment is given by the Commercial Court in The Society of Lloyd's v Sir William Jaffray, Consolidated Action 1996 folio number 2032, or until further order of the Court, from pursuing in the courts of any country other than England any claim against Lloyd's arising out of, or relating to, his/her former membership of Lloyd's and/or former underwriting of insurance business at Lloyd's.

In applying for this relief Lloyd's offer an undertaking not to take any limitation point in respect of the second to eighth defendants (which might otherwise be available) as a result of the grant of the injunction.

Lloyd's relies upon the following evidence in support of the application: the first witness statement of Mr Nicholas Demery, dated 10 February 2000; the second witness statement of Mr Demery, dated 11 February 2000, together with exhibits NPD1-4; the first witness statement of Mr Alan Mitchell, dated 11 February 2000, together with exhibit AJM1; the second witness statement of Mr Mitchell, dated 29 February 2000, together with exhibit AJM2.

Background

The background to the present application is described in Mr Demery's first witness statement at paras 6 to 16. All eight defendants are counter claimants in the Jaffray proceedings.

The management of the Lloyd's Litigation has been the responsibility of the Commercial Court. Prior to the market settlement in 1996, the Commercial Court identified and decided a number of preliminary issues which (subject to appeals) assisted in resolving certain common issues of principle. In addition, the Court selected and decided a number of lead or pilot cases for trial as to liability and general principles relating to quantum.

In September 1996 a market settlement was arrived at. About 95 per cent of Names accepted the market settlement. About 1752 Names did not accept. About 180 Names have since reached individual settlements with Lloyd's. Of the remaining Names as at 1 November 1999, about 148 were claimants in the Jaffray proceedings and about 1420 were not. A number of the remaining Names have joined the Jaffray proceedings since 1 November 1999. In the Jaffray proceedings, the Names allege that they were fraudulently induced to become and remain underwriting members of the Lloyd's market by reason of Lloyd's failure to disclose the nature and extent of the market's liabilities for asbestos-related claims. The trial in the Commercial Court of this issue, the Threshold Fraud Issue. in relation to three sample Names, started on Monday of this week, 28 February. All of the defendants in 2000 Folio No 176, except for Mr Stuart Beale, joined the Jaffray proceedings in or about July 1998, having been included in an affidavit sworn by Mr Freeman a solicitor, on 17 July 1998 (made pursuant to para 3 of the Order of Mr Justice Colman of 30 June 1998). Mr Stuart Beale joined the Jaffray proceedings by giving notice on 29 November 1999, pursuant to para 8 of the Order dated 9 November 1999. All eight defendants are listed in the schedules to the Order dated 14 January 2000.

The Jaffray trial, which started last Monday, is the cumulation of many months' preparation, involving thousands of hours of work and considerable expense in legal costs. Mr Demery states in paras 105 to 107 of his second witness statement:

Location of Documents:

A very substantial discovery exercise has been carried out in England in relation to the Jaffray proceedings by lawyers acting for Lloyd's. I am informed by Freshfields that, since July 1998, Freshfields has conducted a broad review in respect of over 35,000 crates of documents for which there is no central index held by Lloyd's. Out of those 35,000 crates of documents, over 1,000 crates of documents were the subject of a more detailed review, from which over 250 crates of documents were subject of a document-by-document review. Lloyd's has served 22 discovery lists, containing over 60, 000 documents. This very significant volume of Lloyd's documents is located in England. In comparison, Lloyd's has negligible documents in Australia and very few (if any) that would be relevant to the issues raised in the White proceedings. Mr White and the other defendants may have some discoverable documents in Australia but, in comparison to the volume of Lloyd's documents, the volume of these documents is likely to be minimal.

Location of Witnesses:

Lloyd's has also carried out a substantial exercise in interviewing and preparing witness statements for the Jaffray proceedings . . . 47 witness statements and one reliance statement were initially served by Lloyd's by 17 January 2000 and . . . witness statements in reply . . . will include statements from additional witnesses. Of the Lloyd's witnesses a very small proportion only are normally resident outside the UK and none are resident in Australia. It is likely that Mr White and other defendants would want to call some, possibly many, of those giving evidence for the Names in the Jaffray proceedings. The Jaffray Names have served 22 witness statements and three reliance statements. Of the Names' witnesses, only one is believed to be normally resident outside the UK and none are resident in Australia.

Age and Health of Witnesses:

Difficulties have been encountered in preparation of Lloyd's witness statements. Many of the potential witnesses in the Jaffray proceedings (indeed many of those accused of fraud) are now of advanced years, some are not in the best of health, and some have died. During the course of preparing witness statements in the Jaffray proceedings one individual from whom a witness statement was taken has died, and I believe that two individuals have presented doctors' certificates certifying that they are too ill to attend trial (though there may be further doctors' certificates). The events that are concerned in the Jaffray proceedings (and the principal events concerned in the White proceedings) took place in the period 1978 to 1988. It is not clear to me how many of the witnesses that will give evidence at the Jaffray proceedings would be prepared to attend the trial in Australia of the same, or substantially similar, issues due to the pressures of such a trial and the age/poor health of some of those witnesses. The prospect of securing their attendance at trial in Australia seems to me to be remote with, of course, no means of compelling their attendance."

Notwithstanding their involvement in the Jaffray proceedings in England, each of the eight defendants has commenced legal proceedings against Lloyd's in Australia. Lloyd's say that such conduct is in clear breach of the exclusive jurisdiction clause contained in clause 2.2 of the General Undertaking signed by each of the defendants in 1986 or 1987. I set out below the terms of clause 2 of the General Undertaking:

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as 'Proceedings') arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably

waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English court shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of any dispute and/or controversy of whatever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a Member of, or to underwrite insurance business at, Lloyd's."

As to the eight defendants, Mr White served third party proceedings against Lloyd's in the Supreme Court of Victoria in late 1998/early 1999, Mr Luxton issued a writ in the Supreme Court of Victoria on 2 September 1999 (this writ has not yet been served on Lloyd's) and the other six defendants each issued a writ in the Supreme Court of New South Wales on 3 September 1999 (none of these writs has yet been served on Lloyd's).

As to Mr White, Lloyd's is the third party in proceedings before the Supreme Court of Victoria. That action was brought by the Commonwealth Bank of Australia against Mr White, who in turn brought a third party action against Lloyd's (case 1997, number 5660). As an underwriting member of Lloyd's, Mr White was required to provide security to Lloyd's to be held on trust for the payment of policyholders' claims and any other underwriting liabilities, and for this purpose obtained accommodation from the Bank in the form of Irrevocable Letters of Credit in favour of Lloyd's. By 1992, the total value of the Letters of Credit was £168,000. In 1995-1996, in order to satisfy unpaid claims on policies written by Mr White, Lloyd's drew down on Mr White's Letters of Credit to their full extent. The Bank then commenced proceedings in the Supreme Court of Victoria on 11 December 1997, seeking recovery from Mr White of AU$ 427,994.87, together with interest. Service or purported service of Mr White's third party proceedings upon Lloyd's took place in London/Australia in December 1998/February 1999.

On 11 February 2000, the High Court of Australia refused special leave to appeal against the decision of Byrne J on 29.7.99 in the Supreme Court of Victoria. Byrne J had dismissed applications by Lloyd's that the third party proceedings be stayed or dismissed for the reasons set out in his judgment (to which I refer for the full terms thereof). The Court of Appeal in Australia and the High Court of Australia refused to disturb the decision of Byrne J as first instance judge, on the ground that the decision essentially concerned practice and procedure and should not be entertained in the Appellate Courts.

Lloyd's submit that:

(a) any application for an anti-suit injunction in England before exhausting the Australian appellate procedures would have been premature and presumptuous, and

(b) the fact that the Australian Court has assumed jurisdiction in relation to Mr White's claim against Lloyd's does not preclude the English court from granting an anti-suit injunction - see The "Angelic Grace" [1995] 1 Lloyd's Rep 87, per Millett LJ at pps 94 to 96.

As to the other seven defendants, the writs were issued in September 1999. None has been served upon Lloyd's.

Lloyd's Submissions

Mr Brindle QC for Lloyd's, submitted as follows.

As to the Court's jurisdiction, the Court has jurisdiction in personam over the defendants to grant an anti-suit injunction. The duly endorsed claim form was served out of the jurisdiction without permission under RSC Ord. 11, r 1(2) pursuant to the Civil Jurisdiction and Judgments Act 1982 (under article 17 in the Brussels Convention).

Lloyd's seeks to restrain the defendants from further pursuit of any legal action in Australia on the following grounds:

(1) The commencement and pursuit of such legal action is in clear breach of the exclusive jurisdiction clause contained in clause 2.2 of the General Undertaking signed by each of the defendants in 1986 or 1987.

(2) The existence of such legal action is vexatious and oppressive since Lloyd's is having to defend the Jaffray proceedings in England at the same time.

(3) The balance of justice clearly favours the grant of an interim anti-suit injunction in this case, to hold the position pending the outcome of the Jaffray trial in the Commercial Court.

As to (1) breach of the exclusive jurisdiction clause, under the current law, a party who pursues legal action in a foreign court in breach of an exclusive English jurisdiction clause will be restrained from so doing, unless he/she shows "good reason" to justify such a breach of contract and resist the grant of an injunction. The defendants have not shown "good reason" for a refusal of an interim anti-suit injunction in the present case. Although Mr White has pleaded that his consent to the exclusive jurisdiction clause (clause 2.2 of the General Undertaking) in 1986 was vitiated by conduct on the part of Lloyd's, which appears to be an allegation equivalent to an allegation of fraud, Mr White has adduced no credible evidence with which to impeach this clause, see Donohue v Armco Inc and others [1999] 2 Lloyd's Rep 649 at 657-9; cf Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd [1999] 1 Lloyd's Rep 784, [1999] 1 All ER (Comm) 261, at 797. Further, Mr White is a party to the English test cases which have found that rescission of the membership contract is barred under English law, see: Society of Lloyd's v Leighs [1997] CLC 1012, (1997) Times, 11 August.

As to (2) vexatious and oppressive conduct, the defendants' commencement and pursuit of legal action in Australia in breach of the exclusive English jurisdiction clause is, submits Mr Brindle, the paradigm case of vexatious and oppressive conduct. Further, England is the natural and most convenient forum for the resolution of the disputes involved in these proceedings, and the further pursuit of the Australian proceedings in parallel with the Jaffray trial will be manifestly vexatious and oppressive to Lloyd's. As to England being the natural forum, the overlap between the issues and factual inquiries involved in the Jaffray proceedings and the White proceedings is set out at paras 42 to 82 of Mr Demery's second witness statement. England is clearly the most natural forum for the resolution of the present disputes - see the considerations set out in paras 102 to 108 of Mr Demery's second witness statement. Compare Australian Commercial Research & Development Ltd v ANZ McCaughan Merchant Bank Ltd [1989] 3 All ER 65 at 70-72. Lloyd's denies that it has conducted any trading activities in Australia, still less made any offer or invitation to the public in Australia, as claimed by Mr White. To the extent that Mr Justice Byrne made findings against Lloyd's in this regard, the observations of the High Court of Australia on 11 February 2000 appear to indicate that this is not conclusive of the issue in those proceedings. As to vexation and oppression, the Court must assess both the character of the defendants' conduct and the consequences for Lloyd's of having to defend these concurrent and similar proceedings in different jurisdictions. Vexation and oppression are constituted in many different ways, including substantial inconvenience occasioned by the multiplicity of proceedings in disparate jurisdictions It would be unjust and unfair to permit the defendants to pursue parallel sets of proceedings against Lloyd's in different parts of the world, with the risk of inconsistent findings and multiplied cost and inconvenience for Lloyd's. The Jaffray proceedings have now reached trial and the defendants should not be allowed to create additional burdens for Lloyd's, whilst taking the benefit of being parties to the Jaffray proceedings.

As to (3), the balance of justice, Lloyd's will suffer injustice and prejudice if the interim injunction is not granted, and any injustice or prejudice that may be suffered by the defendants if the interim injunction is granted will be insignificant and could be compensated by the cross-undertaking in damages from Lloyd's. As to injustice to Lloyd's, Lloyd's should be free to defend the Jaffray trial without unnecessary diversion or distraction. The allegations against Lloyd's in the White proceedings are similar, but involve different and wider factual issues also. The inconvenience and prejudice which will be afflicted upon Lloyd's by the parallel pursuit of related proceedings in Australia is not capable of quantification. To refrain from granting such an injunction at this stage is likely to reduce the likelihood of Lloyd's obtaining a stay of the White proceedings at the hearing in Australia on 10 March 2000. The interim injunction will be a personal order against the defendants and the Australian Courts will not be offended by such an order. As to injustice to the defendants, the similarities between the factual issues involved in the Jaffray proceedings and the White proceedings cannot be overlooked. There would be no significant hardship to the defendants if an interim anti-suit injunction was now granted, pending the outcome of the Jaffray proceedings, in which all of the defendants are involved. Any difficulties the second to eighth defendants face can be met by the undertaking offered by Lloyd's, referred to above. The position of Mr White is different, given that he is a defendant

to proceedings brought by Commonwealth Bank. In any event, the balance of justice favours the grant of the interim anti-suit injunction sought by Lloyd's. It is for the Australian Court at the directions hearing on 10 March 2000 to determine whether the Bank's claim against Mr White and/or Mr White's claim against Lloyd's ought to be stayed. Given that Mr White alleges in his defence to the Bank's claim, that the Bank had notice of the alleged fraud by Lloyd's, the two sets of proceedings are interrelated. The concept of "juridical advantage" is not relevant to the present application for an interim injunction. The defendants will lose nothing by being restrained pending the outcome of the Jaffray trial.

By way of conclusion, Mr Brindle submitted that Lloyd's must be allowed to concentrate on defending the Jaffray proceedings. The defendants are all party to the Jaffray proceedings. They should await the outcome of that trial and will be bound by the decision. If the defendants wish to pursue their legal action against Lloyd's after that time, then the matter will need to be revisited in the light of the findings of fact and law made in the judgment. In the meantime the defendants will lose nothing by staying their Australian proceedings and awaiting the Jaffray judgment. Lloyd's, on the other hand, will be faced with the unfair burden of preparing and defending parallel proceedings in different jurisdictions, whilst at the same time defending the Jaffray proceedings in court for several months.

The Submissions on behalf of the Defendants

The defendants have not instructed solicitors/counsel to appear before the court today on their behalf. I have, however, received written submissions from Foster Hart, Australian lawyers on behalf of the defendants. It should be recorded for completeness that Mr Church, a partner in the firm of More Fisher Brown, lead solicitors in the Jaffray proceedings, appeared at an earlier hearing on behalf of, or purportedly on behalf of, the defendants.

I have given careful consideration to the defendants' written submissions, to which I will refer. I should point out at the outset that I am concerned that in certain places the written submissions appear to mis-state the effect of decisions of this Court in Lloyd's v Daly (27 January 1998, unreported) Tuckey J and the Court of Appeal in Society of Lloyd's v Fraser and others [1999] Lloyd's Rep IR 156.

The written submissions on behalf of the defendants include the following. The application by Lloyd's for an anti-suit injunction by Mr White should be refused on the ground that Mr White's claims, based on the Trade Practices Act 1974 (Cth), the Companies Act 1961 (Vic) and the Companies (Victoria) Code being not justiciable in an English court, the Supreme Court of Victoria is the only forum which is of competent jurisdiction to determine the merits of these claims. This constitutes good reason not to grant an anti-suit injunction, notwithstanding the existence of an exclusive jurisdiction clause in favour of the English courts. The application for anti-suit injunctions against the second to eighth defendants should be refused because the applications are premature; these defendants would suffer serious prejudice if not permitted to serve their writs during their period of validity.

The submissions on behalf of Mr White include the following. The principal causes of action relied on by Mr White in the Victorian proceedings are breaches of s 52 of the Trade 12 Practices Act 1974 (Cth) and s 11 of the Fair Trading Act 1985 (Vic) and breaches of ss 81 to 83 of the Companies Act 1961 (Vic) and ss 169-171 of the Companies (Victoria) Code. Mr White's claims based on breaches of the Companies Act, the Companies (Victoria) Code and the Trade Practices Act cannot be determined in an English court. [At this point in the written submissions the effect of the decisions of Tuckey J in The Society of Lloyd's v Daly supra and the Court of Appeal in The Society of Lloyd's v Fraser supra are mis-stated]. This is a case in which there is a single forum only that is of competent jurisdiction to determine the merits of the claims under the Companies Act, Companies (Victoria) Code and Trade Practices Act. Where a foreign court is the only forum that is of competent jurisdiction to determine the merits of a claim, a good reason is shown not to grant an anti-suit injunction. (see British Airways Board v Laker Airways Limited and others [1985] 1 AC 58, [1984] 3 All ER 39, Scarman LJ at 95, Diplock LJ at 79 to 80). This is a case where Lloyd's recruited new Names in Australia (at a time when no exclusive jurisdiction clause was present in the General Undertaking) and is sought to be brought to account for its acts in Victoria under Victorian and Australian legislation. The relevant transaction is not overwhelmingly English in character. Lloyd's has by its earlier and subsequent conduct indicated an acceptance of the applicability of Australian law to its Australian operations. Lloyd's should be taken to have accepted that it was subject to Victorian and Australian legislation with respect to its acts in Victoria in connection with the recruitment of Australian names. It is inapposite to speak of a "natural" forum in a single forum case. Alternatively, where there is a single forum only that is of competent jurisdiction to determine the merits of a claim, that forum is the "natural forum" in respect of the claim. The Victorian proceedings are not

vexatious or oppressive because the claims which Mr White raises in those proceedings cannot be raised in any other forum. The principle 13 applicable to the grant of an anti-suit injunction in a case where there is an exclusive jurisdiction clause in favour of the English courts is not expressed as an absolute rule. The court retains a discretion not to grant an anti-suit injunction if good reason is shown. In circumstances where the Supreme Court of Victoria is the only forum of competent jurisdiction to determine the merits of Mr White's claims based on the Companies Act, the Companies (Victoria) Code, and the Trade Practices Act, good reason is shown not to grant an anti-suit injunction. In circumstances where the question of whether Mr White's claims should be permitted to proceed has already been fully agitated in Victoria, applying the same principles of conflict of laws as would be applied by an English court, an anti-suit injunction should not be granted for reasons of comity. It is true that the question now before the English Court is a different one from that which was before the Victorian Court. Nevertheless, in substance, the question is the same: whether the Victorian third party proceedings issued by Mr White should be allowed to proceed. The Victorian Court having already ruled that the proceedings should be permitted to go forward, it would be a breach of comity for the English court to substitute its own decision on this issue. An interim injunction would interfere with the management of the Victorian proceedings in the Commercial List of the Supreme Court and, on the other hand, offer little tangible benefit to Lloyd's. Lloyd's has already applied unsuccessfully for a temporary stay of the Victorian proceedings pending the hearing and determination of the Jaffray proceedings. There is no prospect of the Victorian proceedings between Mr White and Lloyd's being heard and determined before the hearing and determination of the Threshold Fraud Issue in the Jaffray proceedings. Mr White will be bound by any findings of fact made in the Jaffray proceedings without the need for an interim anti-suit injunction. The interlocutory steps likely to take place between now and the determination of the Threshold Fraud Issue in the Jaffray proceedings are:

(a) the filing of an appearance by Lloyd's;

(b) the filing of a defence by Lloyd's;

(c) discovery.

Discovery has already been performed by Lloyd's for the purposes of the Jaffray proceedings. This should reduce considerably the work involved in making discovery in Victoria. On the other hand, interim restraint of the Victorian third party proceedings may cause Mr White substantial injustice because it would assist the Bank in its application to have the proceedings between it and Mr White tried before the third party proceedings.

The submissions on behalf of the Second to Eighth Defendants are as follows. The proceedings against Lloyd's instituted by the second to eighth defendants are not far advanced. Writs have been filed but not yet served. The second to eighth defendants may be seriously prejudiced if restrained from serving the writs. The writs are valid for only one year from filing (unless extended by the Court). Lloyd's application for an anti-suit injunction against the second to eighth defendants is premature. The writs have not yet been served. There is no prospect of a hearing in respect of these proceedings clashing with the Jaffray proceedings. The second to eighth defendants also rely on the submissions by Mr White except where inapplicable to them.

Analysis and Conclusions

The General Undertakings signed by the defendants in 1986 or early 1987 all contain an exclusive jurisdiction clause in favour of the English courts (clause 2.2) and a choice of English law clause (clause 2.1). The management of the Lloyd's litigation has been the responsibility of the Commercial Court. The litigation has been unprecedented in its nature and extent. I refer to the numerous decisions before and after the market settlement in September 1996.

Foreign Securities Legislation

It is necessary to refer to previous decisions of this Court and the Court of Appeal in relation to foreign securities legislation in the context of the Lloyd's Litigation. In response to the problems caused by/reflected in the Lloyd's Litigation, Lloyd's developed the Reconstruction and Renewal Scheme (R&R) using its by-law making powers. R&R was a compulsory insurance and run off scheme whereby Names were required to run off their outstanding liabilities and reinsure them with EQUITAS. Part of the reinsurance scheme required individual Names to pay a reinsurance premium to EQUITAS which corresponded to an assessment of each Name's outstanding future and

accrued liabilities to the end of 1992. The scheme was put to members of Lloyd's in July 1996 and each name had to decide whether or not to accept by September 1996. I have already said that about 95 per cent of Names accepted the market settlement. About 1752 names did not accept. The scheme was implemented in October 1996 and EQUITAS thereafter assigned to the Society its right to receive premiums. Certain Names, being dissenting Names, refused to pay the reinsurance premiums due to EQUITAS. Lloyd's in the latter part of 1996 commenced a series of actions against such Names. In Society of Lloyd's v Daly supra Tuckey J commenced his judgment with these words:

This is a further chapter in the story of Lloyd's attempts to obtain judgment for the premium due under the EQUITAS Reinsurance contract from names who did not accept the R&R settlement. From the outset of the litigation, Names resident in Canada made it clear they wanted to argue that the EQUITAS Reinsurance contract is unenforceable against them by reason of Lloyd's contravention of Canadian Securities legislation . . . I ordered that any Canadian Name not represented by Warner Cranston and any other Name who wished to raise a similar defence based on other foreign securities legislation should identify themselves and if they thought such legislation provided them with a stronger defence than that of Mr Daly, they should explain why 2 Canadian Names, 229 US Names and 11 Australian Names represented by Epstein, Grower and Michael Freeman wish to rely on the defence. They have filed some evidence of Canadian, United States and Australian securities legislation, but it is not submitted that this legislation gave these Names a stronger defence than Mr Daly's, although in the case of US Names, two additional points were taken which I will deal with later in this judgment . . ."

According to the written submissions from Foster Hart, Mr White was among the 11 Australian Names represented by Epstein, Grower.

I refer to the decision of the Court of Appeal in Society of Lloyd's v Fraser supra. Among other arguments the Court of Appeal considered arguments based on the Canadian securities legislation. The Court of Appeal held that the arguments based on the Canadian securities legislation did not provide any basis for giving leave to defend and did not provide any basis for giving leave to appeal. The proper law of contracts with Canadian Names was English law, and the relevant obligations were to be performed in London. Under Ontario securities legislation, the membership contracts had been entered into in an illegal manner and were unenforceable against the Names. However, on established principles of English private international law, any question of material or essential validity was governed by the proper law, and no question of formal validity under a foreign law could arise where the contract was both made in England and governed by English law Any invalidity or lack of enforceability under a foreign law was irrelevant. There was no question of enforcing an act which would involve infringement of the law of Ontario, and the contract did not offend against a principle of universally recognised positive law as the provision was regulatory in character and was not universal, so that no question of infringement of comity arose.

In the course of his judgment, Hobhouse LJ said at p172:

It was agreed by all concerned that the case of a Canadian non-accepting Name, Mr Donnel Russell Daly, should be taken as the test case . . .The relevant question was one of conflict of laws. The relevant contracts contain an express English law and jurisdiction clause. The Rome Convention does not apply . . . (p 173:) The proper law of all the relevant contracts was English law. The contracts were made in London at the time his application was accepted. The relevant obligations which he undertook to the Society to perform were all obligations to be performed in London. It was not a contract which called for any performance in Canada . . . The question raised therefore is whether the fact that an act illegal under the law of Ontario preceded and led to Mr Daly's subsequently entering into a contract in England governed by English law, and that fact that the contract would be unenforceable in Canada against Mr Daly, has the consequence in English law that the contract is unenforceable against Mr Daly in the English courts.

On established principles of English private international law any question of the material or essential validity of a contract is governed by its proper law (Dicey, Rule 184) - here English law. Similarly no question of formal validity under a foreign law can arise where the contract is both made in this country and governed by English law (Dicey, Rule 183). Any invalidity or lack of enforceability under a foreign law is irrelevant. Mr Leczner in his argument sought to escape from this conclusion by relying upon two acknowledged exceptions to the general rule to which we have referred. The first is that English law will not enforce a contract insofar as it requires the performance in a foreign country of an act contrary to the law of that foreign county: Ralli Bros v Co Nav Sota y Aznar [1920] 2 KB 287. Similarly an English court will not enforce a contract which has as its purpose the breaking of the laws of another Country, Foster v Driscoll [1929] 1 KB 520, even if it would be capable of performance without committing

such breach: Regazzoni v Sethia [1958] AC 301, [1957] 3 All ER 286. This line of argument did not assist the Applicants because the contract between Mr Daly and the Society did not require or involve the performance of any act in Ontario contrary to the law of Ontario, nor did it have as its purpose the commission of any breach of the law of Canada or any Province.

The second way the Applicants' case was put was to rely upon the exceptions recognised in Re Missoun Steamship, 42 Ch D 321 at p 336, per Lord Halsbury:

'Where the contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world and no civilised country would be called on to enforce it.'

In Vita Food v Unus Shipping [1939] AC 277 at 297, Lord Wright said:

'In this passage Lord Halsbury would seem to be referring to matters of foreign law of such character that it would be against the comity of nations for an English court to give effect to the transaction just as an English court may refuse in proper cases to enforce performance of an English contract in a foreign country where the performance has been expressly prohibited by the public law of that country. The exact scope of Lord Halsbury's proviso has not been defined.'

The Applicants submit that the enforcement of the present contract against Mr Daly does offend against a principle of universally recognised positive law and that it would be contrary to the comity of nations that English courts should enforce it.

This submission cannot be accepted. No question of enforcing any act which would involve infringement of the law of Ontario was involved. The provision is regulatory in character (Pezim v Attorney-General British Columbia 114 DLR 385). It exists in Ontario and other parts of Canada but is not a universal one and, for example, there does not exist in English law any equivalent provision which prevents the enforcement of this contract against Mr Daly or any other underwriting Name. No question of infringement of comity arises. In this connection it is to be observed that the question of comity was considered by the Court of Appeal in their judgment of 1997. They said:

'This court is bound to proceed in accordance with settled principle and is not to be fettered by speculative regard as to how its judgment may be received abroad.'(p28)

Further, the two cases relied upon in this context, the Missouri and Vita Food cases, both involved the enforceability of contracts which contravened the law of the place where they were made so that they would be treated as illegal and invalid or unenforceable by the law of that place but were upheld as fully enforceable because they did not contravene the chosen proper law.

Established authority which cannot be seriously questioned demonstrates that the argument advanced based upon the Canadian securities legislation provides no defence. These contracts must be enforced in accordance with English law. No question of public policy or comity is involved. Indeed, as is pointed out in the skeleton argument on behalf of the Society, the acceptance of this argument would mean that the insurance contracts entered into by Mr Daly would likewise be void and unenforceable, a consequence which for obvious reasons Mr Daly disclaimed, because their validity under English law depended upon the validity of Mr Daly's underwriting membership of Lloyd's. If he was not an underwriting member of Lloyd's he could not lawfully enter into any insurance contract, as an insurer, in England. No principle of comity or public policy would suffice to justify that result and, as we have said, it was one which Mr Daly has implicitly recognised to be unacceptable.

Accordingly, for reasons which are substantially the same as those given by Tuckey J, the arguments based upon the Canadian securities legislation did not provide any basis for giving leave to defend and do not provide any basis for giving leave to appeal. The Canadian Names' general application for a stay of execution must also fail for the reasons given by the Court of Appeal in 1997."

The principles relevant to applications for an ant-suit injunction in cases where there is an exclusive jurisdiction clause

I set out below the principles relevant to applications for an anti-suit injunction where there is an exclusive jurisdiction clause.

1. Where a contract provides that all disputes between the parties are to be referred to the jurisdiction of the English courts, the court normally has jurisdiction to hear and determine proceedings in respect thereof. An English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to an English (or semble, another foreign) court (Dicey and Morris, The Conflict of Laws, (13th edn) vol 1, rule 32(1) and (4)).

2. Where an injunction is sought to restrain a party from proceeding in a foreign court, in breach of an exclusive jurisdiction clause or an arbitration agreement governed by English law, the English court will, where appropriate, grant an injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. There is no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause. The justification for the grant of the injunction in both cases is that without it the claimant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is discretionary and is not exercised as a matter of course, but good reason needs be shown why it should not be exercised. (The "Angelic Grace" [1995] 1 Lloyd's Rep 87 at 96, Millett LJ.)

3. The burden of establishing a good reason for not granting an injunction in the case of an exclusive jurisdiction clause is upon the party in breach of the clause (Donohue v Armco Inc and Others, Aikens J [1999] 2 Lloyd's Rep 649).

4. To a considerable extent, the principles to be applied in the context of an exclusive jurisdiction clause are the same whether a court is considering an application for a stay or an application for an anti-suit injunction. The principles differ only where the different nature of the relief sought renders a particular principle inapplicable to the form of relief.

5. Where proceedings are brought in breach of an exclusive jurisdiction clause, the test for the grant of an anti-suit injunction is the same test as that which applies where a stay of English proceedings is sought (Ultisol Transport Contractors Limited v Bouygues Offshore SA [1996] 2 Lloyd's Rep 140 at 149). The Court must, when considering all such applications, take into account all the circumstances of the case.

6. If the party applying for an injunction has already litigated the issue of jurisdiction in another state and failed, this will be a significant factor counting against him, if that court has applied principles relating to jurisdiction similar to those applied by this Court (The "Angelic Grace" supra). Where the foreign court is not bound to apply such principles, or has not applied such principles, the fact that the issue of jurisdiction has been litigated in another state will not generally be significant (Airbus Industrie GIE v Patel and others, [1997] 2 Lloyd's Rep 8).

7. In considering whether to grant an injunction, the Court will also take account of:

(a) whether the claimant seeking an injunction applied promptly and before foreign proceedings were too far advanced (The "Angelic Grace" supra). The longer the delay that occurs before the application is made, the more likely a court is to refuse it;

(b) any voluntary submission to the jurisdiction of the foreign court, particularly where proceedings have progressed for any period of time (A/S D/S Svendborg v Wansa [1996] 2 Lloyd's Rep 559 at 570);

(c) the undesirability of a second set of proceedings where the matter is already being litigated elsewhere, except where there are powerful reasons for so doing (The "Abidin Daver" [1984] 1 AC 398, [1984] 1 All ER 470 at 411 and 423).

5, 6, and 7 above are drawn from the judgment of Thomas J in Akai Ltd v People's InsuranceCo Ltd [1998] 1 Lloyd's Rep 90 at 105.

The application of the above principles

Should an anti-suit injunction be granted in the present case? It is to be noted that Lloyd's only seek an injunction until after judgement in the Jaffray proceedings. The defendants in company with other Names allege in the Jaffray proceedings that they were fraudulently induced to become and remain underwriting members of the Lloyd's market by reason of Lloyd's failure to disclose the nature and extent of the market's liabilities for asbestos-related claims. The trial has already started.

I have, with a full sense of comity, paid careful regard to the decisions of the Courts of Australia. I should, however, record that it does not appear to me that any of the following potentially relevant decisions of the English Courts were drawn to the attention of Byrne J. If they were, they are not referred to in his judgment. The decision of Gatehouse J in Ashmore & Others v Corporation of Lloyd's (No 2) [1992] 2 Lloyd's Rep 620; the decision of Saville J in Lloyd's v Canadian Imperial Bank of Commerce & Others [1993] 2 Lloyd's Rep 579; the judgment of Saville J in the same case on 20.7.03; the decision of the House of Lords in the Merrett, Feltrim and Gooda Walker cases [1995] 2 AC 145, [1994] 3 All ER 506, the decision of the Court of Appeal in Lloyd's v Clementson; Lloyd's v Mason [1995] LRLR 307, (1994) Independent, 11 November as to alleged implied terms; the judgment of the Court of Appeal in Lloyd's v Leighs supra; the judgment of Tuckey J in Lloyd's v Daly supra; the judgment of the Court of Appeal in Lloyd's v Fraser supra. (I have already recorded that in my opinion the defendants, in their lawyers' submissions, mis-state the effect of the decision of Tuckey J in Lloyd's v Daly supra and the Court of Appeal in Lloyd's v Fraser supra).

(In addition, it seems to me that the various confidentiality orders made by the Court in the Jaffray proceedings should have been drawn to the attention of Byrne J.)

The defendants have not, in my opinion, established a good reason for not granting an injunction in the terms sought, to restrain a breach of the exclusive jurisdiction clause. In my view it is vexatious and oppressive to pursue the Australian proceedings while the Jaffray trial is proceeding. The defendants allege in the Jaffray proceedings that they were fraudulently induced to become and remain underwriting members of the Lloyd's market by reason of Lloyd's failure to disclose the nature and extent of the market's liabilities for asbestos-related claims. These allegations are of the utmost seriousness. As the trial judge, I am familiar with the nature, extent and complexities of the trial. I refer to the passages quoted above from paras 105-107 of Mr Demery's second witness statement which provide a fair indication of certain aspects of the trial, in particular location of documents, location of witnesses, and age and health of witnesses. It seems to me that there is good reason to grant the relief sought by Lloyd's while the Jaffray trial is proceeding.

(For completeness, I refer to the fact that the Court has, by directions, sought to address in the Jaffray proceedings problems of confidentiality in relation to certain materials before the Court. The approach adopted in this connection follows the approach adopted by the Court in earlier cases forming part of the Lloyd's Litigation. It is common ground in the Jaffray proceedings that there are good commercial reasons to justify the confidentiality orders).

In all the circumstances, applying the principles set out above, in the exercise of my discretion I grant the injunction sought.

Because of this court's concern to exercise caution, having regard to the decisions of the Australian courts, I emphasise there will be liberty to apply to vary or set aside this injunction generally, and in particular following any further consideration of this matter by the Australian courts.

DISPOSITION:

Judgment for the claimant.

SOLICITORS:

Freshfields