ANECO REINSURANCE UNDERWRITING LTD (IN LIQUIDATION) v JOHNSON & HIGGINS LTD

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

[1998] 1 Lloyd's Rep 565

HEARING-DATES: 10, 11, 12, 17, 18, 19, 23, 24, 25, 26, 30 June, 1, 2, 7, 8, 9, 10, 17, 18, 21 July, 1 August 1997

1 August 1997

CATCHWORDS:
Reinsurance -- Insurance brokers -- Non-disclosure and misrepresentations -- Brokers placed plaintiffs' excess of loss reinsurance contracts with underwriters -- Arbitrators held underwriters entitled to avoid cover on grounds of brokers' misrepresentation and non-disclosure -- Plaintiffs claimed damages from brokers for breach of contractual duty and negligence -- Whether brokers made fair presentation of risk and all material circumstances to underwriters -- Measure of damages.

HEADNOTE:
On 30 Dec, 1988 the plaintiffs (Aneco) subscribed to three units out of 10 of a permanent special priority treaty which was a reinsurance of the marine excess of loss account of Syndicates 255, 258, 259 and 668 underwritten by Mr NT Bullen (the Bullen treaty). The treaty was a facultative/obligatory (fac/oblig) treaty (the reassured might cede and the reinsurers should accept risks up to a maximum of US$25,000 only one unit in respect of any risk as might be declared). Mr Bullen was to have a minimum of 20 per cent retention but could reinsure that 20 per cent against specific perils or limited conditions and could effect excess of loss reinsurance to protect his net retention and the agreement was to apply to risks attaching on or after 1 Jan, 1989.

Aneco subsequently subscribed to two units of an excess of loss special surplus reinsurance agreement which was a reinsurance of the excess of loss accounts of Syndicates 216, 833, 834 underwritten by Mr CH Bohling (the Bohling treaty).

The defendant insurance brokers (J & H) secured reinsurance for Aneco by placing six contracts for the whole of Aneco's marine excess of loss account (the six XL contracts). The reinsurers on each layer were from both the Lloyd's and the London companies market and the overseas market. Mr David King was the leader on all the layers. Mr Adams and Mr Green took substantial lines on all the layers.

There was an arbitration between Aneco and Lloyd's underwriters in 1995. By an interim award the arbitration tribunal held that Lloyd's underwriters were entitled to avoid the cover because of the misrepresentation and non-disclosure on the part of J & H. The arbitrators awarded and declared that the six XL contracts had been validly avoided ab initio by all the underwriters; Mr King and the 1st to 24th respondent underwriters were entitled to recover all sums respectively paid by each of them under those contracts; and since the 25th to 29th respondents had paid no claims Aneco were entitled to recover all premiums paid to them under the contracts.

In these proceedings Aneco claimed damage from J & H for breach of a contractual duty of care and negligence in relation to the placement of the XL contracts.

Aneco contended that the misrepresentation and non-disclosure related principally to the nature of the Bullen treaty which was a facultative/obligatory treaty and to the fact that the information sheet provided to underwriters failed to make it clear that a figure given for the estimated premium income (EPI) related exclusively to the Bullen treaty.

Aneco submitted that J & H misrepresented to Mr King the lead underwriter, to Messrs Adams, Green, Winter and to the underwriters for Copenhagen Re and Norwich Union that Aneco had written or intended to write a quota share of Mr Bullen's account; and had misrepresented to the overseas companies market and in particular Mr Delanoue of Ancienne Mutuelle that the Bullen treaty was a quota share reinsurance; J & H did not disclose to any underwriter that the only treaty that Aneco had formed the intention to write at the time of presentation was a facultative/obligatory treaty; J & H did

not disclose to certain underwriters that the whole of the disclosed EPI was derived from the Bullen facultative/obligatory treaty; and J & H did not disclose to any of the following underwriters that Mr King's subscription to the risk and his rating of it were obtained by misrepresentation.

The arbitrators had found that J & H had misbroked an amendment (the Bohling amendment) to the excess of loss reinsurance which was designed to procure reinsurance cover for Aneco's prospective acceptance of the Bohling treaty.

J & H disputed these allegations and maintained that there was a fair presentation of the risk to all the underwriters.

Aneco argued that as a result of J & H's breaches of contractual duty and negligence they were entitled to recover losses incurred by Aneco under the Bullen and Bohling treaties which were underwritten by Aneco in reliance on the advice given to them by J & H that the excess of loss reinsurance was available and had been placed on the terms advised; alternatively Aneco were entitled to recover the loss measured by reference to the extent to which Aneco were unable to recover under the excess of loss reinsurance.

Held, by QB (Com Ct) (CRESSWELL J), that (1) the Bullen treaty was a fac/oblig treaty; with a fac/oblig treaty the reinsured had the right to select which risks he wished to cede to that treaty and the reinsurer was obliged to accept those risks; under a quota share treaty the reinsured was obliged to cede and the reinsurer had to accept those risks covered by the quota share treaty; the Bullen treaty could not fairly be described as a quota share treaty; at the time of the presentations the only treaty that Aneco had formed an intention to write was the Bullen treaty; and the brokers should have disclosed that the only treaty Aneco had formed the intention to write at the time of the presentations was the fac/oblig treaty of the Bullen syndicates (see p 591, cols 1 and 2);

(2) a fair presentation of the risk required disclosure that the underlying business at the relevant time consisted of a fac/oblig treaty for the NT Bullen Syndicates covering excess of loss business where the rate on line of the original contract fell between 2 per cent and 20 per cent; further the information sheet gave the impression that the EPI was deprived from a number of contracts and the way the EPI was put in par I of the information sheet would not indicate that such premium would be received under one fac/oblig treaty from NT Bullen only and this should also have been disclosed (see p 591, col 2);

(3) an underwriter overseas reading the presentation would probably have reached the conclusion that the NT Bullen contract referred to was a quota share contract; the matter should have been disclosed to the overseas market; and the presentation to the overseas market was seriously misleading (see p 591, col 2);

(4) the brokers should have disclosed the material circumstances that the only treaty that Aneco had formed an intention to write or had written at the time of the presentation was a fac/oblig reinsurance of the Bullen syndicates and that the whole of the EPI was derived from this one fac/oblig treaty; to the extent that J & H failed to disclose all or some of those material circumstances they failed to act with reasonable skill and care (see p 591, col 2; p 592, col 2; p 593, col 1);

(5) on the facts and the evidence J & H had misrepresented to Mr King the lead underwriter to Messrs Adams, Green and Winter and to the underwriters for Copenhagen Re and Norwich Union/Maritime that Aneco had written or intended to write a quota share of Mr Bullen's account; J & H also misrepresented to the overseas market (and in particular Mr Delanoue of Ancienne Mutuelle) that the Bullen treaty was a quota share reinsurance (see p 593, col 1);(6) Messrs King, Adams, Green, Winter, Mackenzie, Jenkins and Delanoue were induced by the material misrepresentations to enter into the respective contracts and J & H were negligent in making the said misrepresentations (see p 593, col 2; p 594, col 1);

(7) as to the material circumstance that the treaty was a fac/oblig treaty, this was not disclosed to certain underwriters and each of those underwriters were induced to enter into the respective contracts by such non-disclosure (see p 594, cols 1 and 2);

(8) as to the material circumstances that the only treaty Aneco had formed an intention to write (or had

written) at the time of the presentation was a reinsurance of the Bullen syndicates and that the whole of the EPI was derived from this one treaty, these were not disclosed to the underwriters Patrick Watkins Delahunty Jay (Prudential), Pexton Jenkins (Norwich Union/Maritime) and these non-disclosures induced each of these underwriters to enter into the respective contracts (see p 594, col 2);

(9) as to the material circumstance that the whole of the EPI was derived from one treaty, this was not disclosed to Mr Delanoue (Ancienne Mutuelle) and this non-disclosure induced Mr Delanoue to enter into the relevant contracts (see p 594, col 2);

(10) each subscribing underwriter made a separate contract or contract on behalf of his syndicate or company; in the particular circumstances the fact that J & H misrepresented to Mr King, as lead underwriter that Aneco intended to write a quota share of Mr Bullen's account (and not a fac/oblig treaty) was a material circumstance which the brokers were required to disclose in order to make a fair presentation of the risk to each of the following Lloyd's underwriters and that this negligent non-disclosure induced the making of the contract in each case; Aneco were entitled to rely on a presumption of inducement in the case of those underwriters who did not give evidence and there was no evidence to displace the presumption of inducement (see p 596, col 2; p 597, col 1);

(11) J & H were in breach of the implied term in the contract between Aneco and J & H that J & H would act with reasonable care and skill in and about obtaining quotes for and placing the excess of loss reinsurance and J & H were negligent (see p 597, col 1);

(12) if it had been necessary to consider the Bohling amendment, Mr King's handwriting on 20 Jan, 1989 "Reassured has accepted specific Aviation Treaty from one reassured -- EPI $10,000" accurately reflected what Mr King was told, and this was another example of inadequate broking by J & H (see p 597, col 1):

(13) alternative security would probably have been available at a broadly similar price if there had been a fair presentation of the risk; and Aneco's loss should be measured by reference to the extent to which Aneco were unable to recover under the excess of loss reinsurance (see p 599, col 2; p 600, col 2; p 601, col 1).

CASES-REF-TO:

Arbuthnott v Feltrim Underwriting Agencies Ltd, [1995] CLC 437;
Bank Leumi Le Israel BM v British National Insurance Co Ltd, [1988] 1 Lloyd's Rep 71;
Banque Bruxelles SA v Eagle Star Insurance Co plc, (HL) [1997] 1 AC 191;
Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd, (HL) [1990] 2 Lloyd's Rep 377; [1991] 2 AC 249;
Berriman v Rose Thomson Young, [1996] LRLR 426;
Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd, (CA) [1984] 1 Lloyd's Rep 476;
Deeny v Gooda Walker Ltd, [1994] CLC 1224;
Ikarian Reefer, The [1993] 2 Lloyd's Rep 68; Kanchenjunga, The (HL) [1990] 1 Lloyd's Rep 391;
Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd, (HL) [1994] 2 Lloyd's Rep 427 [1995] 1 AC 501; (QB (Com Ct)) [1992] 1 Lloyd's Rep 101;
Rich (Marc) & Co v Portman, [1996] 1 Lloyd's Rep 430;
Smith New Court Securities Ltd v Scrimgeour Vickers, [1996] 3 WLR 1051;
St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd and Others, (CA) [1995] 2 Lloyd's Rep 116;
Superhulls Cover Case, The [1990] 2 Lloyd's Rep 431;
Wynniatt-Husey v Bromley, [1996] LRLR 310;
Zephyr, The (CA) [1985] 2 Lloyd's Rep 529.

INTRODUCTION:
This was an action by the plaintiffs Aneco Reinsurance Underwriting Ltd (in liquidation) claiming damages from the defendants, Johnson & Higgins Ltd their insurance brokers for breach of a contractual duty of care and negligence in relation to the placement of six excess of loss reinsurance contracts which an arbitration tribunal had found to have been validly avoided by the underwriters on

the grounds of non-disclosure and misrepresentation on the part of the brokers.

COUNSEL:
Mr Ian Hunter, QC, Mr David Joseph and Miss Philippa Hopkins for the plaintiffs; Mr Christopher Clarke, QC and Mr R Southern for the defendants.

PANEL: Cresswell J

JUDGMENTBY-1: CRESSWELL J

JUDGMENT-1:
CRESSWELL J: A number of points of general interest to the reinsurance market emerge from this case:

1. It is highly desirable that means be found of recording (in a form which precludes later dispute) what was said between broker and underwriters at the time of presentation of a risk.

2. It is highly desirable in the interests of justice (and of avoiding unnecessary cost and delay) that whenever practicable claims over against brokers be heard at the same time and by the same tribunal that determines whether underwriters have validly avoided.

3. This case reflects inadequate standards of broking by the defendant brokers. One of the most telling comments in the case was made by a witness who observed "it is much better to say what you mean in business".

Introduction

On 30 Dec, 1988 Aneco Reinsurance Underwriting Ltd ("Aneco"): subscribed to three units out of 10 of a permanent special priority treaty which was a reinsurance of the marine excess of loss account of Syndicates 255, 258, 259 and 668 underwritten by Mr NT Bullen ("the Bullen treaty").

(Aneco subsequently subscribed to two units of an excess of loss special surplus reinsurance agreement which was a reinsurance of the excess of loss accounts of Syndicates 216/833/834 underwritten by Mr CH Bohling ("the Bohling treaty").)

The salient features of the Bullen treaty were that: (1) it was in respect of Mr Bullen's Marine XL Account: art I;

(2) The treaty was a facultative/obligatory treaty: The Reassured may cede . . . and the Reinsurers shall accept . . . risks up to a maximum of $25,000 any one unit in respect of any risk as may be declared [art III(i).]

(3) Mr Bullen was to have a minimum 20 per cent (2 units) retention but could reinsure that 20 per cent against "specific perils or limited conditions": art III(v) and could effect excess of loss reinsurance to protect his net retention: art IV(vi).

(4) The agreement was to apply to risks attaching on or after 1 Jan, 1989 and was to continue in force until termination by three months' notice to expire on 31 Dec in any year (as it did in 1989): art IV(i) and (ii).

(5) The premium was to be ONR received by Bullen less 2 per cent overriding commission and a profit commission of 20 per cent.

Johnson and Higgins Ltd ("J & H") secured reinsurance for Aneco by placing six contracts of reinsurance providing excess of loss protection for the whole of Aneco's marine excess of loss accounts ("the six XL contracts"). Table 1 sets out the limits of the respective layers, the ROL for each layer, the deposit premium and the minimum premium and the adjustment percentage.

TABLE 1

Limits
ROL
DP
Adjusted to

(MP)
Rate on

Income

1.
$400,000 excess
30%
$120,000
8.875%

of $200,000
($96,000)

2.
$600,000 excess
17.5%
$105,000
7.75%

$600,000
($84,000)

3.
$1.2 million excess
10%
$120,000
8.875%

of $1.2 million
($96,000)

4.
$1.6 million excess
7.5%
$120,000
8.875%

of $2.4 million
($96,000)

5.
$2 million excess
6.25%
$125,000
9.25%

of $4 million
($100,000)

6.
$2 million excess
5%
$100,000
7.40%

of $6 million
($80,000)

51.025%

Total of Deposit Premium
$690,000

Total of Minimum Premium
$552,000

It is to be noted that: (a) the aggregate first loss exposure was US$7,800,000 excess of a retention of US$200,000 each and every loss. The contract also provided for two reinstatements so that the aggregate was in total US$23,400,000; (b) the rate on line is the deposit premium expressed as a percentage of the limit of indemnity. The minimum premium was 80 per cent of the deposit premium; (c) the adjustable percentage was reached by dividing, in the case of each layer, the deposit premium by the estimated premium income of US$350,000.

The reinsurers on each layer (and they differed between layers and in amount per layer) were from both the Lloyd's and the London Companies market and the overseas market. Mr David King was the leader on all the layers. Mr Adams and Mr Green took substantial lines on all the layers.

The present action follows on from an arbitration between Aneco and Lloyd's underwriters (30 Syndicates in all) conducted in early 1995. By an interim award of March, 1995 the arbitration tribunal (Sir Michael Kerr, Mr Hugh Thompson and Mr Peter Fryer) held that the Lloyd's underwriters who were the respondents to that arbitration were entitled to avoid the cover because of misrepresentation and non-disclosure on the part of J & H. The arbitrators awarded and declared inter alia that: (1) The six excess of loss reinsurance contracts had been validly avoided ab initio by all the respondent underwriters; (2) Mr King and the 1st to 24th respondents were entitled to recover (net of premium) all sums respectively paid by each of them under these contracts; (3) since respondents 25 to 29 had paid no claims, Aneco was entitled to recover all premiums paid to them under the contracts.

I refer to the interim award and reasons for the full terms thereof.

Summary of Aneco's allegations of breach of contractual duty and negligence

In these proceedings Aneco claim damages from J & H for breach of a contractual duty of care and negligence in relation to the placement of the XL contracts.

Aneco's case in outline is as follows.

The excess of loss reinsurance purportedly placed by J & H has subsequently been avoided by (to date) about 70 per cent of the total security on the grounds of a series of serious misrepresentations and non-disclosures by J & H on placement. The right of the Lloyd's underwriters to avoid their participation in the excess of loss reinsurance was established by the arbitration award of March, 1995.

The misrepresentations and the non-disclosures relate principally to the nature of the Bullen treaty, which was a facultative/obligatory treaty, and to the fact that the information sheet provided to underwriters failed to make clear that the figure given for EPI related exclusively to the Bullen treaty. More specifically, the principal allegations are as follows:

(1) J & H misrepresented to Mr King, the lead underwriter, to Messrs Adams, Green, Winter, and to the underwriters for Copenhagen Re and Norwich Union, that Aneco had written or intended to write a quota share of Mr Bullen's account and not a facultative/obligatory treaty, as was in fact the case. J & H also represented to the overseas companies market and in particular Mr Delanoue of Ancienne Mutuelle that the Bullen treaty was a quota share reinsurance;

(2) J & H did not disclose to any underwriter that the only treaty that Aneco had formed the intention to write at the time of presentation was a facultative/obligatory reinsurance of Bullen;

(3) J & H did not disclose to certain underwriters that the whole of the disclosed EPI was derived from the Bullen facultative/obligatory treaty. Quite the reverse: underwriters were given the impression from the Information Sheet that Aneco's EPI would be made up of a spread of "London Market Proportional Contracts";

(4) J & H did not disclose to any following underwriter that Mr King's subscription to the risk and his rating of it were obtained by misrepresentation/non-disclosure.

In addition, the arbitrators found that J & H had misbroked an amendment to the excess of loss reinsurance ("the Bohling amendment"), which was designed to procure reinsurance cover for Aneco's prospective acceptance of the Bohling treaty. The broking of the Bohling amendment is not, in fact, independently causative of any loss, but it is nonetheless relevant in considering the careless manner in which J & H set about broking the excess of loss reinsurance, particularly since both underlying treaties were fac/oblig treaties.

The quota share misrepresentation lies at the heart of case. It is evidenced by the contemporaneous underwriting records of Messrs King, Adams, Green and Winter. It is also evidenced by the underwriting records of the Copenhagen Re and Norwich Union. It is further clear that J & H were content to describe the underlying business as a quota share to all the overseas market in a circular letter sent to those companies in December, 1988. (Incidentally, they did the same thing when placing the reinsurance for Aneco's marine account with the same market in January, 1990.)

The above elements of the presentation by J & H were materially inaccurate and unfair. The fact that the underwriters' exposure to loss was derived wholly from Aneco's losses under a facultative/ obligatory contract was highly material and undesirable. At the heart of a facu1tative/obligatory contract is the right of the cedant to select which risks are to be ceded. This is not possible under a quota share treaty, where all risks within the defined parameters have to be ceded. The right to select permits, and often results in, an imbalanced spread of risks being ceded. This in turn distorts the exposure of the reinsurer and likewise that of the reinsurer's excess of loss retrocessionaires.

Further, there was a strong perception in the minds of nearly all the underwriters who gave evidence (which perception was correct) that facultative/obligatory treaties permitted an anti-selection of risks by the cedant versus his reinsurer. This would enure to the advantage of the cedant, Mr Bullen, and to the disadvantage of Aneco, and of Aneco's excess of loss reinsurers. Likewise, it was material for underwriters to be informed that, while Aneco intended to build a portfolio of contracts, the entire EPI given to the underwriters was derived from the one treaty which was a facultative/obligatory ("fac/oblig") treaty.

J & H dispute these allegations and maintain that there was a fair presentation of the risk to all underwriters.

Reinsurance and the XL market

For a brief general description of XL and LMX business, the "spiral" and growth of the LMX market during the 1980s see Society of Lloyd's v Clemenson, [1997] LRLR 175 at p 207, Mr Justice Cresswell. I also refer to the following LMX cases (the first category of the Lloyd's litigation):

Deeny v Gooda Walker Ltd, [1994] CLC 1224, Mr Justice Phillips;

Arbuthnott v Feltrim Underwriting Agencies Ltd, [1995] CLC 437, Mr Justice Phillips;

Berriman v Rose Thomson Young, [1996] LRLR 426, Mr Justice Morison;

Wynniatt-Husey v Bromley, [1996] LRLR 310, Mr Justice Langley.

A helpful and clear exposition of the "spiral" is set out in Chapter 2 of the report of Sir David Walker to Lloyd's.

Chronology

It is necessary to refer to some of the principal events in this matter.

November 15, 1988: Fax from Mr Paul Forster of J & H to Mr Jonathan Crawley of Aneco:

SUBJECT: NT Bullen -- Special Priority Treaty We are very pleased to offer you a share in the above contract, full details of which please find attached. As you probably know Norman Bullen is a very well respected Marine underwriter who has underwritten an Excess of Loss account for many years . . . the treaty is new this year and has been designed to enable Norman Bullen to write a greater spread of Excess of Loss business in the middle to top layer bracket. We feel that this contract will enable you to participate in a good spread of business which, as a consequence of the "Piper Alpha" loss, is now generating considerably more premium than last year, indeed, if our own experience is anything to go by most layers this year at this level are at least doubling in price. As this is the first year the treaty will be in operation we do not have a proven record but would expect any loss falling under the contract to be a "market" type loss in the nature of a "Piper Alpha" disaster. The estimated income each unit is $300,000 with Bullen expecting to place up to ten units . . .

18 November, 1988: Fax from Mr Forster to Mr Crawley re NT Bullen -- special priority treaty:

. . . 2. The business will be purely Marine but it is conceivable that there may be some incidental non-marine incorporated in these whole accounts. 3. Bullen has asked that you consider up to four units. 4. Would suggest you buy XL protection for up to 10 times income and would envisage comprehensive protection being available at between 30% -- 40% of NPI (Net Premium Income).

30 November, 1988: Meeting between Mr Crawley, Mr Bullen and Mr Green of the Bullen syndicates and two representatives of J & H including Mr Forster, in the Captain's Room at Lloyd's. Mr Forster's notes of the meeting include the following:

Crawley has agreed to write three -- three and a half units on basis PI $400 -- $450 . . . quotes for XL (protections) to be developed.

2 December, 1988: The Aneco information sheet bears this date and stated as follows:

ANECO REINSURANCE UNDERWRITING LTD and/or QUOTA SHARE REINSURERS if any.

1. Estimated Premium Income

US$1,200,000 to US$1,350,000.

2. Aneco intend to participate in London Market Proportional Contracts covering Excess of Loss business having original Rates on Line of between 20% and 2%.

Drilling Rig accounts will be in excess of US$150,000,000 in respect of original losses on the MDRC (Master Drilling Rig Cover).

3. It is the intention that the following business will not be written:

(a) Working Layers (ie where the rate on line is 30% to 40%).

(b) Aviation or Non-Marine unless incidental in respect of Whole Account Marine.

(c) Specific Liability Excess of Loss.

The slips defined the interest as follows:

This Reinsurance is to pay all losses (including War, Strikes, Riots, Civil Commotions and Malicious Damage Risks as Original) howsoever and wheresoever arising, during the period of this Reinsurance, in respect of all losses sustained by the Reinsured in respect of Business allocated to

their Marine Excess of Loss Account.

5 December, 1988: Telex from Mr Crawley to Mr Forster:

This is merely to confirm that we will do up to 3.50 PCT lines part of ten lines of which the reassured will retain not less then two lines. The business will be limited to contracts having rate on lines of between 2% and 20% and the treaty will be per the slip which you sent us except that the overrider will be 3% on net. Our participation must be subject to your obtaining satisfactory XOL terms for our net account excess of hopefully not more than $100,000.

5 December, 1988: Fax from Mr Forster to Mr Crawley:

. . . Your Excess of Loss protections. We are pleased to advise the following quotations obtained from David King together with a suggested slip format and information sheet. You will note from the wording that we are trying to give you some flexibility should you decide to participate in similar additional contracts . . .

6 December, 1988: Telex from Mr Crawley to Mr Forster headed "NT Bullen Special Priority Treaty":

Thanks for your fax which crossed with my telex. Your advised inward slip is fine and your draft outward slip is also OK. I do however find Dave King's terms exorbitant and they frankly spoil the attraction of being involved . . . see what you can do to improve.

6 December, 1988: Fax from Mr Forster to Mr Crawley:

Further to today's telcon and our exchange of telexes etc pleased to confirm having obtained the following revised quotations from Dave King . . . adjustment rates will be based on EPI $1,350,000 . . . he wants 100% deposit premium on earned with minimum premium of 80% of above . . . we will contact Bullen to-morrow and get some idea of aggregate exposure from business written at 1 January. This will give us a more accurate idea as to how much protection you should purchase at this time with a view to perhaps buying more as and when aggregate increases throughout they . . .

6 December, 1988: Telex from Mr Crawley to Mr Forster:

Many thanks for your revised terms for XOL protections which although somewhat more palatable now depend upon premium income generated in order to make commercial sense. Accordingly please also talk to Norman in the morning about the premium income aspect as well as the initial and build-up of aggregate liability. We now need not less than 1,350,000 and 1,500,000 would be prettier.

7 December, 1988: Telex from Mr Forster to Mr Crawley:

. . . Norman Bullen . . . has maximum of three units available for you, he is very confident that premium per unit will be at least US$450,000 providing market follows current trends . . . as advised although maximum exposure will not occur until at least midway through the year we recommend you buy up to US$8 million coverage. We have quoted now as feel retro market is likely to contract even further during the year and may mean if we stagger placements there will not be any capacity available at a later date.

7 December, 1988: Telex from Mr Crawley to Mr Forster:

. . . we confirm our acceptance of three units and we also confirm your firm offer to place 7.8 million excess of 200,000 per your fax of yesterday . . .

8 December, 1988: Mr King scratched the information sheet and six slips (one for each layer).

8 December, 1988: Draft J & H fax to the overseas market included the following sentences which were subsequently deleted from the draft:

We fully appreciate the difficulty in placing retro business in the current climate but as can be seen from the prices all of the layers are extremely well paid. This account is extremely important to us as

firstly it is a new introduction in respect of marine business and in time it will almost certainly become very substantial. We would like you to explore all possibilities and look forward to hearing from you . . .

16 December, 1988: J & H fax (first approach) to the overseas market stated:

. . . we are pleased to offer you a share in the above, full details of which together with relevant information please find attached. Aneco as you probably know operate out of Bermuda writing purely non-marine business predominantly emanating from captive insurance companies. Aneco have now taken the view that they would like to participate in Marine Excess of Loss Business by way of following established Lloyd's underwriters who can Quota Share an evenly balanced spread of business to them. So far they have a firm contract through Norman Bullen's Lloyd's Syndicate, who as can be seen from the information sheet will be ceding Middle to Top Layer Business. As can be seen from the prices the layers are extremely well paid, bearing in mind the excess point is in excess of the projected income. We look forward to confirmation of your maximum line at your earliest convenience.

A copy of the above fax was sent inter alia to Ancienne Mutuelle.

12 December, 1988: Fax from Mr Yardley of J & H to Mr Crawley setting out the extent to which the six layers of protection had been placed.

12 December, 1988: Further fax from Mr Yardley to Mr Crawley setting out the progress of placement of XL reinsurance.

30 December, 1988: Further fax from Mr Yardley to Mr Crawley setting out the progress of placement of XL reinsurance.

30 December, 1988: Slip signed evidencing Aneco's participation in the Bullen treaty.

1 January, 1989: Second approach to the overseas market.

19 January, 1989: Fax from Mr Yardley to Mr Crawley advised 100 per cent completion on the six layers of protection.

20 January, 1989: Mr King signed the following amendment to the information sheet in his own handwriting:

3(b) Reassured has accepted specific Aviation Treaty from one reassured -- EPI 10,000.

10 March, 1995: Interim arbitration award and reasons.

1 May, 1995: Writ issues in these proceedings.

Witnesses

It is necessary to make one general comment before referring to the evidence from the large number of witnesses in this case. Understandably many of the underwriters did not have any independent recollection of the presentation of the risk. I have taken this into account in my assessment of the evidence of these witnesses.

The following witnesses were called by Aneco.

Mr Jonathan Crawley

Mr Crawley was at all material times president of Aneco. Mr Crawley had considerable experience first as a broker then as an underwriter in the non-marine market. I formed the impression that Mr Crawley was a generally reliable witness.

Towards the end of 1989 Mr Crawley decided that Aneco should consider being involved in the marine market for 1989. Following Piper Alpha in July, 1988, a sharp rise in premium rates was anticipated. He took the view that major losses in the marine market were rare and that it was statistically unlikely

that something similar to Piper Alpha would occur in 1989. Aneco were to go into the marine market on a proportional basis. At a meeting on 30 Nov, 1988 in the Captain's Room at Lloyd's Mr Crawley made it clear to Mr Bullen and to Mr Forster that if Aneco were to participate on the lines discussed, such participation would be subject to J & H being able to obtain satisfactory excess of loss protection for Aneco. This was confirmed in the last paragraph of his telex dated 5 Dec, 1988:

. . . our participation must be subject to your obtaining satisfactory XOL terms for our net account excess of hopefully not more than $100,000.

The terms obtained by J & H (see Table 1 above) appeared to Mr Crawley to be satisfactory at the time.

Mr Crawley said that if he had been asked at the time what type of treaty the Bullen treaty was, he would have regarded it as a London market proportional contract. The slip reflected the protection that he was looking for. He considered that the information sheet was accurate. He added that what a broker puts on the information sheet and what a broker chooses to say to the market orally, is the broker's concern.

Aneco ended up with a cost of protection of 51 per cent and a level of protection of somewhere between 60 per cent and 70 per cent of what Mr Crawley had taken as the aggregate exposure. He would not have been prepared to go below a figure of the order of 60 per cent to 70 per cent of what he regarded as the aggregate. Had he not been able to achieve the cover he needed, either because it was unplaceable or because it was too expensive, then Aneco would not have participated in the Bullen treaty. Aneco was at the edge, the borderline, of the risk being economical/uneconomical at the 51 per cent figure.

The first knowledge Mr Crawley had of the way the marine market in Lloyd's and the London companies marine market regarded fac/obligs was during the arbitration.

Mr David King

Mr King, the lead underwriter, was the underwriter of Syndicate 745. Mr King was later appointed by Lloyd's to conduct a loss review into the operation of Mr NT Bullen's syndicates. Mr King was in my opinion an impressive witness and I have no hesitation in accepting his evidence as to the presentation of the risk.

At the first meeting with Mr Forster (on 2 Dec or 5, 1988) Mr King was shown the quote sheet (which has quotes in manuscript put down by Mr King). A second meeting followed on 6 Dec, 1988. At the third meeting on 8 Dec, 1988 Mr King scratched the information sheet and six slips (one for each layer).

Mr King kept a manuscript record setting out brief details of the risk to which he had agreed to subscribe. He said that it was on the basis of the information given to him verbally by the broker that he recorded in the "details" box of the underwriting records: "X/L A/C iro NTB Q/Share" ie "Excess of Loss account in respect of NT Bullen Quota Share". Mr King said that he was positive that this risk was broked to him as "Aneco are writing a quota share of Bullen -- they want protection". Mr King said that Mr Forster did not show him the telex from Mr Crawley dated 6 Dec, 1988 (headed "NT Bullen Special Priority Treaty") and I accept this.

Mr King set out a number of objections to fac/ oblig contracts as follows. The reinsurer has no control over the risk ceded. There is a tendency for cedants to use such contracts as a "dumping ground" for high risk or other poor quality business. There is a risk of anti-selection by the cedant against the reinsurer (Aneco) and a consequent further risk of anti-selection against Aneco's reinsurers. Certain brokers would offer to Mr King unattractive risks and suggest that he then ceded them under his own fac/oblig. He would explain that he did not have such protection to which the response would be, "Surely you have got a chute." One underwriter even had a saying: "If you want to know what we don't write, look at the declarations to our fac/oblig cover." The anti-selection which the fac/oblig contract permitted Mr Bullen to make against Aneco, and thus against Aneco's excess of loss reinsurers, was of two types. First, a fac/oblig would permit Mr Bullen to cede to Aneco predominantly the XL on XL ("spiral") business in preference to or even to the exclusion of any other specific or foreign accounts.

Secondly, Mr Bullen would have been permitted under the fac/oblig to cede all his exposure at top levels. The reinsurer is concerned about the level of exposure compared to the cedant's excess point.

Mr King said that he has always argued that a fac/oblig is not proportional, although he is aware that the view taken by many underwriters and brokers is that the proportional family includes quota share contracts, surplus treaties and fac/oblig treaties.

Mr King said that Mr Forster would have been aware that he would not quote a protection on a fac/oblig treaty. There would have been no way he would have quoted this business as fac/oblig on a marine excess of loss account for Mr Bullen or anyone else on a pure London market excess of loss account.

Mr King was willing to quote to protect the quota share for Aneco on the basis that he knew Mr Crawley. If Aneco had appeared out of the blue he would not have quoted at all. He was writing virtually no protections of fac/obligs other than renewals over a number of years. There was no point giving Mr Bullen a much wider scope to underwrite in a tight market.

Mr King dealt inter alia in his evidence with the Bohling amendment and the 1990 renewal.

Mr Stephen Adams

Mr Adams was the underwriter of Syndicate 1125. Mr Adams was in my opinion a reliable witness and I accept his evidence as to the presentation of the risk.

Mr Adams was shown the following by Mr Forster: The marine excess of loss programme, the information sheet and six slips. Syndicate 1125's lines were promised by Mr Adams in early December, 1988. The syndicate's lines were in fact written by Mr Adams' deputy Mr Burke on 9 Dec, 1988. The notes appearing in the notes/losses/reinsurance" section of the underwriting record were completed by Mr Burke as a result of what Mr Adams told him. The following has been noted on the underwriting records:

1-Only business written at moment -- Q/S of Synd 255 (NTB)

2-Only X/L Tty written at the moment -- Q/S of NTB

3-Q/S of Synd 255 (NTB)

4-Only busy at the moment -- Q/S of Synd 255 (NTB)

Mr Adams said that he was told by the brokers that Aneco was protecting a quota share treaty in favour of Syndicate 255, as is evident from the notes on the underwriting records.

Mr Adams said that a quota share with the terms set out in the information sheet would have been fairly unusual.

Mr Adams stated that he used to work with Mr King. Over the years they had seen and operated themselves several fac/obligs. They were nervous about the workings of fac/obligs. Had he been told that the risk was a fac/oblig, he would not have written it.

If he had been told that the risk had been misbroked to the lead, this would have changed his perception of the broker and the risk.

Mr Terence Green

Mr Green was the underwriter of Syndicate 321. Mr Green said that he did not have any independent recollection of the presentation of the risk, apart from what was set out in the documents. Nonetheless I consider that Mr Green's evidence as to the presentation of the risk was reliable.

Mr Green was shown the following by Mr Forster: The marine excess of loss programme, the information sheet and the six slips.

Mr Green said that one underwriting record was completed at the same time as the risk was being broked to him. To save time, it was then photocopied six times, and one record attached to each slip for each contract. He was told by the brokers that the premium would be mainly derived from a fixed quota share treaty protection of Mr Bullen. This he said is evidenced by the underwriting record completed at the time of the subscription to the risk on 9 Dec, 1988 on which Mr Penny had noted as follows: "Prem Derived from Q/S of NTB". Mr Green believed, as was his practice, that he asked Mr Penny to make that notation on the underwriting record while Mr Forster was sitting next to him and while Mr Forster was making his presentation. Mr Green, Mr Penny and Mr Forster were cramped together on less than 6 ft of bench. It was the practice for the comments on the record to be a reflection of the conversation with the broker, and not the information contained in the information sheet. The comments on the record were additional information gleaned from interview with the broker. That was the practice that applied to pretty well every risk that the syndicate wrote. Mr Green was certain that he established that this was a quota share treaty. The EPI was described as being an estimate "derived from Bullen".

Mr Green stated that in his experience the word "proportional" could only refer to quota share treaties. It was not uncommon for a particular section of an account to be quota shared.

Mr Green said that he would almost certainly not have subscribed to the Aneco contracts had he known that Aneco was protecting Mr Bullen under a fac/oblig treaty. By giving a fac/oblig authority he would be allowing Mr Bullen to retain a greater proportion on the risks that he considered to be attractive and a lesser proportion on the risks that he did not consider attractive.

It is daft to put your competitors in a better position than you are yourself . . . by offering fac/oblig facilities, that is just what you gave your cedants the ability to do . . . on a quota share . . . if it hurt me it hurt Norman Bullen equally . . . on a fac/oblig basis, it could hurt me a lot more than it could hurt Norman Bullen and that just seems to me to be daft.

Mr Green emphasized that he understood it was a quota share -- he would not have written the risk if he had understood it was a fac/oblig.

Mr Green explained that it was market practice at the time that detailed negotiations concerning terms and rates would generally take place between the lead underwriter and the brokers. The fact that Mr King had subscribed to each contract with a substantial line, was a factor in his decision whether or not to subscribe to these contracts. Mr King's writings in the early and mid 1980's had produced very good results for his Names, and he was very well respected. Mr Green added that when being asked to subscribe to any risk, and making an initial assessment, one of the matters for first impression was the identity of the leader. He would not have subscribed to these contracts had he known that the brokers had misrepresented the risk to Mr King.

It is common ground that the following Lloyd's market was known by the brokers: marine excess of loss programme, information sheet as scratched by Mr King and photocopy slips. It is common ground that the London companies market was shown the same as the following Lloyd's market, save that if they were broked by Mr Forster they probably saw what Mr Green and Mr Adams saw, ie original rather than photocopy slips.

The overseas market was sent covering fax, modified marine excess of loss programme, information sheet as scratched by Mr King and copy slips as already signed by Mr King and others. The overseas market was approached in two tranches: first by faxes dated 16 Dec, 1988 and secondly by faxes dated 9 Jan, 1989.

As to the London companies market and the overseas market this is merely a convenient way of grouping the companies for the above purposes. The distinction is not between English and overseas companies as such, but rather between those companies which had an underwriter with a pen at a desk in London, to whom the risk was broked in person, and those who did not, to whom a fax with attachments was sent.

Mr Elvin Patrick

Mr Patrick was the underwriter of Syndicates 566 and 726. I formed a favourable impression of Mr Patrick's evidence.

Mr Patrick said that in view of the passage of time he could not warrant that Mr Bullen's name was not mentioned, but he thought this unlikely.

Although quota share treaties, surplus treaties and fac/oblig treaties are all proportional, Mr Patrick said he would expect to be told if the contract in question was a fac/oblig.

Mr Patrick said that there can be quota shares of any segmented part of an account. The important point is that you get a fixed proportion of every risk that is in the segment.

Mr Patrick stated that if the broker represents the risk as a book of proportional contracts and it turns out to be a single fac/oblig, "that is an extremely different kettle of fish". If he had known that Mr Norman Bullen was the main cedant on a fac/oblig he would not have written the risk. If he had been told that the whole or substantially the whole of the premium income was fac/oblig or Bullen fac/oblig that would have put him off -- "you would not . . . give somebody like Mr Bullen fac/oblig".

The fact that Mr King led these contracts confirmed to Mr Patrick that Mr King had confidence in this risk. If he had been told that a fair presentation had not been made to Mr King, he would not have subscribed.

Mr Patrick said that a renewal gets favourable consideration compared to a new piece of business.

Mr Mark Watkins

Mr Watkins was the underwriter of Syndicate 904. Syndicate 904 wrote business in parallel with Syndicate 457 (a split stamp, 80 per cent on Syndicate 457 and 20 per cent on Syndicate 904). Mr Watkins struck me as a careful witness. Mr Watkins had no recollection of the presentation of this risk. He accepted that it was probably broked by Mr Yardley.

Mr Watkins said that if the broker had told him that there was only one contract in the pipeline he would have noted that in his records. Had he been told "the present contract is Mr Bullen and we hope to get others" he would have probably noted that. If the risk had been broked by Mr Yardley as a fac/oblig he would have noted his records accordingly.

Mr Watkins assumed that what was being referred to was a quota share.

Mr Watkins said that if the brokers knew the identity of Aneco's intended cedant and the nature of the treaty, that information should have been provided to underwriters. In view of the marked difference between a quota share and a fac/oblig Mr Watkins would have expected to have been told that he was covering one or two fac/obligs, and not a number of quota shares.

Mr Watkins said that when protecting a quota share, it is possible to gauge your position as against that of the cedant. When writing a protection of a fac/oblig this is not possible -- reinsurers have no control over the business ceded and therefore there is a risk that the reassured will select against Aneco (and therefore its reinsurers) effectively using the treaty as a "chute" for poor business. Protecting fac/oblig treaties is more disadvantageous to reinsurers, and therefore brokers usually disclose the identity of the cedant. In the case of a fac/oblig the cedant may be able to cede proportionally more of the risks which have a lower ratio of premium to liability.

Mr Watkins said that he believed that proportional contracts, unless otherwise defined, meant quota shares but accepted that the word proportional can apply to both quota shares and fac/ obligs.

Mr Watkins assumed that a fair presentation of the risk had been made to Mr King. If he had known that this was not the case he would not have written the contracts.

As to the protection of the fac/oblig treaty that Mr Bullen had with CER, Mr Watkins said he wrote a very small line on this risk and explained that the syndicate did a great deal of business with the broker concerned. Further this risk paid more than the Aneco treaty at the same level.

Mr Laurence Winter

Mr Winter was the underwriter of Syndicate 724. His recollection was dependent on the note on his files. I consider that on a balance of probabilities Mr Winter's note on the slips on 10 Jan, 1989 accurately reflects what he was told by the brokers.

Mr Winter promised a line on 9 Dec, 1988. He actually subscribed to the Aneco risk on 1 Jan, 1989.

On the slips for the relevant layers Mr Winter wrote on 10 Jan, 1989:

Basically XL on NT Bullen XL quota share

XL on basically NT Bullen XL quota share

XL on basically NT Bullen XL quota share.

Mr Winter explained that the syndicate's practice was to have a meeting every morning -- each risk subscribed the day before would be gone through, with comments made as appropriate. Mr Winter was asked whether it was possible that when he came to make his note on 10 Jan he looked at the information sheet, recalled that the premium was in effect Bullen and because of his view of what proportional ought to mean, wrote his notes. Mr Winter said that may have been the case, but he did not believe it was. He added that when entering a promised line he would reiterate with the broker the basis of writing the line.

Mr Winter said that if Aneco wished to protect fac/oblig treaties this should have been made clear in any presentation by the brokers. Underwriters use fac/obligs to cede poorer quality business and referred to a "chute".

Mr Winter stated that whereas in general Lloyd's parlance "proportional" may be used to include fac/oblig, his personal understanding is that proportional does not include fac/oblig. He referred to seeing quota shares of defined sections of an account.

Mr Winter said that had he known that Aneco was intending to protect their fac/oblig writings he would have wished to receive further information from the brokers as to the nature of the underlying business being ceded. This would have been material to his decision whether to accept Mr King's ratings of the contracts as to premium and to the extent of his syndicate's own lines. If the broker had indicated that the underlying treaty between Mr Bullen and Aneco was fac/oblig, Mr Winter would have expected the programme to be more expensive.

Mr Winter assumed that a fair presentation of the risk had been made to Mr King. If he had known or suspected that this was not the case, he would not have wanted to have anything to do with the contracts.

Mr Rodney Clifford

Mr Clifford was underwriter of Syndicate 725. He had no recollection of writing the risk.

When asked by the tribunal whether if he had been told it was one treaty or if he had been told it was a portfolio of treaties, it would have been the practice on the box to have marked his records to that effect, Mr Clifford said probably not.

Mr Clifford said that he would have considered it material that, at the time the risk was broked to him, Aneco only had one contract in the pipeline (being a fac/oblig contract) which accounted for the whole EPI.

If he had been told that the only business about to be written by Aneco and covered under the excess of loss contracts was a Bullen treaty, he did not believe that he would have subscribed since he would not have wished to support an excess of loss contract, where the business was derived from such a specific source. There would have been no wide spread of risk. If he had been told that the name of

Bullen had been mentioned as a cedant he would have made enquiries to find out what the nature of the contract was and only if he was satisfied would he have accepted the risk. But he believed this was material information.

Mr Clifford said that had he known that a fair presentation of the risk had not been made to Mr King he would not have written the contracts.

Mr Leslie Sawyer

Mr Sawyer was the underwriter of Syndicate 1025. He had no independent recollection of what was said at the time of the placement.

Mr Sawyer said the broker could well have said that Aneco had one contract in the pipeline with the Bullen syndicate under which that syndicate had the ability to cede business within the guidelines specified in the information sheet.

Mr Sawyer said that he was not told by the broker that Aneco intended to protect a fac/oblig of Mr Bullen. He considered this to be a material non-disclosure by the brokers, particularly where the information sheet stated that Aneco intended to enter into "proportional" (ie quota share) treaties with their cedants in respect of excess of loss business with rates on line of between 20 per cent and 2 per cent. If there was only one contract in the pipeline being a fac/oblig contract to Bullen and that one contract constituted the whole EPI, Mr Sawyer would have wanted to be told this by the brokers. To the best of his recollection he was not told that there was only one contract, a fac/oblig to Mr Bullen, which constituted the whole EPI.

Mr Sawyer said that under a fac/oblig treaty the cedant may declare whatever business he wishes. The cedant is able to use the treaty as a "chute" for any business which he does not like or wish to retain. The cedant is able to select against his reinsurers by off-loading the bad business and retaining the good business. Bad business is business written as a favour or as a way of getting good business from the same broker. Bad business may not be particularly well rated or may not have a good record.

Mr Sawyer considered that a proportional contract is limited to a fixed quota share treaty, a surplus treaty and a variable quota share. It was not particularly unusual to have a quota share arrangement with the characteristics in the information sheet.

Mr Sawyer said he had not knowingly entered into fac/oblig treaties on an excess of loss account. Had he been told that Aneco intended to protect their fac/oblig writings, he would not have entered into these contracts on behalf of Syndicate 1025.

Mr Sawyer said that in 1989 Mr King was a well respected leader of excess of loss business. Had he been told there was a misrepresentation to Mr King, he would have wanted to know what it was and would probably have gone back and spoken to Mr King about it before accepting a participation. Invariably the leader would spend a lot longer looking at the programme, than the following subscription market.

Mr Michael Delahunty

Mr Delahunty was underwriter of Syndicate 527. He believed that the risk was broked to him by Mr Yardley. He was unable to recall the precise details of the presentation. Despite this I was impressed by Mr Delahunty's evidence.

Mr Delahunty said it was his understanding that the EPI figures related to all business which would be written by Aneco and protected under the contracts. He thought it unlikely that he was told by the brokers that the only business then written or about to be written by Aneco was a treaty with the Bullen syndicates, as he did not make any note to that effect in his underwriting records. It would have been unusual for him to write an excess of loss contract that only protected one underlying cedant and he would have made a note of this. Syndicate 527's box was next to that of Mr Bullen. Despite this fact he would effectively be writing Mr Bullen's business through Aneco, when he could have done so directly without the extra 10 per cent in commission being taken by the brokers. Mr Yardley might have said the Bullen contract was in the pipeline but if the income was in respect of one cedant, he could not

suggest at the same time that Ancco was hoping to find other business, otherwise as soon as there was another cedant he would have to come back and get the risk re-rated. The information sheet suggested that the EPI was going to be obtained from a block of business with Lloyd's underwriters, not just one.

Mr Delahunty said that if at the time of the presentation there was only one contract in the pipeline being a fac/oblig contract with Mr Bullen which constituted the entire EPI, he ought to have been informed of these matters by the broker. To the best of his recollection he was not so informed.

Mr Delahunty said that fac/oblig treaties, particularly when placed with foreign insurance companies, are really no more than a "chute" for unsavoury business. There is a significant risk of being selected against by the cedant.

Mr Delahunty did not believe that a fac/oblig treaty could be described as proportional. He regarded the expression variable quota share treaty as a synonym for fac/oblig.

Mr Delahunty said that it has been a long standing syndicate policy not to enter into any fac/ oblig treaties either by reinsurance or direct.

The fact that Mr King led each of the contracts played a part in Mr Delahunty's underwriting decision. Mr King was seen as an expert in the excess of loss market. As a following underwriter Mr Delahunty felt that he was benefiting from Mr King's experience. He assumed that a fair presentation of the risk had been made to Mr King. If he had known that this was not the case, he would not have written the contracts.

Mr David Jay

Mr Jay was the underwriter for the Prudential and the Pearl. He managed the total marine account of the Prudential. Lines were promised by Mr Jay on 5 Dec, 1988 -- they were written by one of his assistants on 9 Jan, 1989. Mr Jay was plainly an extremely experienced and careful underwriter. Although he did not have any recollection of the presentation in question I was impressed by his evidence.

Mr Jay said that looking at the information now and trying to reconstruct, he was surprised to find there was one Lloyd's underwriter involved and that it was a fac/oblig contract. If there was only one contract which was actually written he would have expected to have been told this by a broker, and who the underwriter was. It would be relevant to look in his own records and establish the degree to which he already had commitments with that particular underwriter. In underwriting he sought to achieve a broad spread of business so far as possible. The narrower the focus of business, the less attractive it is. That does not mean that he would not have written it but it was nevertheless relevant. If the EPI was solely from the Bullen contract it was a matter that he would have wished to have known about. It is likely he would have asked what "London market proportional contracts" signified, but he had no recollection of asking the question or what the response was. If it had been specified in the information sheet that the income related to the Bullen contract and that it was a fac/oblig reinsurance, then he would withdraw his reservations.

As to the fac/oblig contracts, Mr Jay said that it is universally held in the marine insurance market that a reinsurance on a fac/oblig basis is less attractive to an underwriter than a reinsurance on a quota share basis. A fac/oblig is attractive to the reinsured, but unattractive to the reinsurer. From the reinsurer's perspective he will be given by the reassured the sort of business the reassured wants to get rid of. Mr Jay said he could not recollect writing any excess of loss protections of fac/oblig business.

On the assumption that it was Aneco's intention to write a range of business including quota share, surplus and fac/oblig treaties it would be reasonable to refer in the information sheet to an intention on Aneco's part to participate in London market proportional contracts.

Mr Jay said that although XL on XL is an opaque business, this does not mean that it cannot be underwritten in a sensible way and that considerations of good underwriting judgment do not apply.

If the risk was misbroked to the lead underwriter, this was something that Mr Jay would have wished to know about. The market works on the basis of recognized leaders in the various categories of business which are placed in the London marine market. Excess of loss business is and was a particularly difficult and dangerous class of business. There were certain respected leaders in the class whose work almost entirely consisted of writing business in that particular class as specialists. The fact that the business was led by such a specialist would have been an extremely important consideration and one which would have given any following underwriter considerable confidence.

Mr John Davies

Mr Davies was the underwriter of Syndicate 1021. He had been in the Lloyd's market 63 years. Mr Davies accepted that the risk was probably broked to him by Mr Yardley.

Mr Davies said that it was customary for brokers trying to broke fac/obligs to tell an underwriter that it was a fac/oblig. On the assumption that there was one contract in the pipeline with Mr Bullen, that was something that Mr Davies would have expected to have been told by the broker. When it was suggested to him in cross-examination that Mr Yardley would have said that Aneco had one contract in the pipeline with Bullen, he replied that he had no recollection either way. In re-examination Mr Davies said that he was certain that Mr Bullen's name was never mentioned. If the EPI related to one Bullen contract in the pipeline that was something he would have expected to have been told. When cross-examined Mr Davies said that Mr Yardley may have indicated that the EPI was an estimate based on the Bullen contract.

Mr Davies said that Mr Bullen would write business that other underwriters (without fac/oblig protection) would not write. He added that it is well known that fac/oblig protections have been abused for many years in the market and that is why brokers cannot place fac/oblig business, if they are open enough to tell underwriters that it is such business. The reinsurer under a fac/oblig treaty is at risk of being selected against.

Mr Davies did not believe that a fac/oblig treaty is a proportional contract. In his view the word "proportional" covered quota share and surplus contracts. He agreed with hindsight that the wording of the information sheet indicated an unusual form of quota share.

Mr Davies said that had he known that Aneco had entered into a fac/oblig treaty he would not have subscribed to these contracts.

He assumed that a fair presentation of the risk had been made to Mr King. If he had known that this was not the case he would not have considered writing the risk and would have made it his business to see Mr King and advise him of the situation.

Mr Davies referred to a conversation with Mr Bullen. Mr Bullen's protections for the 1988 year were insufficient. Sometime in 1989 Mr Davies asked Mr Bullen whether he had revised his protections to ensure that Syndicate 255 and its Names would not be exposed (to such an extent as in 1988) in the event of future catastrophic type losses. Mr Bullen explained that he had much better protections and had been able to obtain a fac/oblig "chute" outside of London under which he was able to select the business which he wished to reinsure. It did not occur to Mr Davies until 1994 that Mr Bullen was referring to his special priority treaty with Aneco.

Mr Richard Pexton

Mr Pexton was the deputy underwriter of Syndicates 760 and 780. Mr Pexton had no recollection of being approached by Mr Yardley. Mr Pexton produced copies of his syndicates' underwriting records. I consider that the absence of reference in the records to a proposed treaty with Mr Bullen provides support for Mr Pexton's account.

Mr Pexton said looking at the information sheet he assumed, from his knowledge of Aneco's writings of non-marine business, that this book of business would be a mix of business on a fac/oblig and quota share basis.

Mr Pexton said that he now understood that the EPI given in the information sheet did not in fact relate

to all the business which might be written under the contracts, but only to part of that business, specifically Aneco's treaty with Mr Bullen.

Mr Pexton did not believe that he was told this -- had he been told he would have noted his underwriting records accordingly. On the assumption that there was only one contract in the pipeline, a proposed reinsurance of Mr Bullen's syndicates on a fac/oblig basis which comprised the entire EPI, he would have wanted to have been told about these matters by the broker.

Mr Pexton believed the word "proportional" to mean that Aneco could write both fac/oblig and quota share treaties in favour of their cedants. He derived his understanding of what a proportional contract is through reading books and going to college.

Mr Pexton said that he was quite happy to follow Mr King, a recognized market leader. It is of paramount importance that the leaders are given a fair presentation, otherwise they cannot evaluate the risk correctly in arriving at the rating. If he had known that a fair presentation had not been made, then he would not have written this business.

Mr Hugh Hayward

Mr Hayward was the excess of loss class underwriter of Syndicate 401. He believes that the broker who presented the risk to him was Mr Yardley. Mr Hayward did not have any recollection of the circumstances in which the risk was broked and what was said at the time. The front sheet of the box records was the only sheet that was kept in the case of this syndicate. Any comment by the broker would have been noted on an information sheet.

Mr Hayward said that he probably asked the broker (although he could not now recall) the identity of Aneco's cedants. He has no recollection of the answer. Since he understood the word "proportional" to refer to a quota share treaty, there was no need to amplify this aspect of the information provided by the brokers. He did not believe he was told, at the time of subscribing to the risk, that Aneco had entered into a special priority treaty. The term has no meaning to him. If at the time of the placement of the risk Aneco had only one contract in the pipeline, a fac/oblig reinsurance of the Bullen syndicates, and that contract constituted the whole of the EPI, Mr Hayward would have wanted to have been told these matters by the brokers as they would have influenced his underwriting decision.

Mr Hayward said that in the case of a fac/oblig the reinsured could select against the reinsurer ie Mr Bullen could have reinsured all his bad business (bad risks more likely to result in claims) at 10 per cent and kept all his good business at 10 per cent. Mr Hayward added that in his experience over 30 years there has always been anti-selection with fac/ obligs. When it was suggested to Mr Hayward that with this type of business the risk is opaque, Mr Hayward disagreed saying you know who are the better people to reinsure, the people who probably had less XL than other people. It was not just a question of writing everybody at a rate on line.

Mr Hayward believed in January, 1989 that the word "proportional" referred to fixed quota share treaties. He did not believe that "proportional" could refer to either a variable quota share treaty or a fac/oblig treaty. He was not aware there were others in the market at the time who held a different view as to the meaning of proportional contracts. He did not accept that the terms of the information sheet indicated an unusual form of quota share.

In 1989 Mr Hayward's syndicate generally did not write Mr Bullen's account, but they did have one or two contracts of his. In Mr Hayward's opinion Mr Bullen was one of the poorer XL underwriters in Lloyd's at the time, by reference to the quality of the business that he wrote. Mr Hayward said that had he known that Aneco were intending to protect, or had protected Mr Bullen's writings by way of a fac/oblig treaty, he would have wanted to know a great deal more about that treaty before deciding whether or not to subscribe to the excess of loss contracts. He could not say with certainty that he would not have subscribed to the contracts, however he would have required much greater information.

If there had been an unfair presentation of the risk to Mr King, Mr Hayward would have wanted to have been told about that. By unfair Mr Hayward meant some material misrepresentation or non-disclosure which could affect the rate that Mr King applied to the contract or the quality of the business.

Mr Duncan Mackenzie

Mr Mackenzie was the underwriter for the Copenhagen Re. He also wrote pursuant to an agency agreement for three other companies -- Athel Re, Norse Re and Reinsurance Corporation of New York (UK) Ltd. Mr Mackenzie when giving evidence of what was said at the time of placement, was able to refer to his contemporary records. In my view these provide powerful support for his evidence on this central issue.

The Copenhagen Re had outwards reinsurance in the form of two separate treaties, one for marine and one for non-marine. The treaties were fac/oblig proportional treaties called special surplus, placed mainly overseas. The treaties were in fact operated as a quota share.

Although the Copenhagen Re have lost a number of files the front sheets of the computerized record have survived. Mr Mackenzie explained how the records were made up at the time by reference to a form known as Form 201. The front sheets of the computer record state "account covered -- XL A/C 100% LMX (QS [ie quota share] of N Bullen)". This entry would have been made either at the time of the presentation or after the broker had left, but always within the same working day. All records were entered and filled out in this way in 1989 because Mr Mackenzie had to report to the managing director on the day of writing.

Mr Mackenzie said that the entry on the front sheets of the computer record meant that he was informed by Mr Forster that the risk was a quota share of NT Bullen syndicates. He would have written out separate Forms 201 in relation to each layer, writing out "XL A/C 100% LMX (QS of N Bullen)" four times. The information that he was given was that there was a quota share of NT Bullen with an EPI of US$1.35 m (the figure on the front sheets of the computer record).

Mr Mackenzie said it would have been important to know whether it was in truth a quota share or a fac/oblig. At the time the Copenhagen Re did not cover fac/obligs. Although exceptions could be made, they would carry a more severe rating. Facultative/oblig treaties were not popular with Mr Mackenzie's then management because of a perception of the possibility of adverse selection by the cedant.

Without reference to a given contract, a reference to London market proportional contracts would include fac/oblig contracts.

Mr Mackenzie said that if he had appreciated that the Bullen/Aneco treaty was fac/oblig as opposed to quota share it is not inconceivable that he would have written the layers he wrote, but at a different price.

If the risk was in fact misbroked to the leader, Mr Mackenzie would have wished to know this for rating purposes. The reinsurance of a fac/oblig treaty would attract a higher rate than that of a quota share.

Mr Mackenzie in addition gave evidence in relation to the allegation of affirmation (see below).

Mr Peter Staples

Mr Staples was claims manager of the Copenhagen Re. He gave evidence in relation to the allegation of affirmation (see below).

Mr Staples referred to his contemporary note in his own handwriting of his meeting with Mr Oliver and Mr Knox on May 24, 1995. Mr Staples said he would not dream up a note such as this without some basis for it, and I accept this evidence. He disputed the final words in J & H's note of the same meeting -- "and would be happy to continue to settle claims to this contract if asked". I prefer Mr Staples' evidence to the effect that he did not say this.

Mr Maurice Howell

Mr Howell was the deputy underwriter of Syndicate 272 and the active underwriter of Syndicate 1093. The two syndicates ran in parallel. The broker who presented the risk to Mr Howell was Mr Forster.

Mr Howell said that on the initial presentation he declined the risk. Mr Forster came back some time afterwards and explained that the brokers were having problems with the slip. Mr Howell wrote the risk as an "oblige" to Mr Forster. Mr Howell said "by helping (Mr) Forster somewhere in the future I help myself, because there is a pay back for everything." The most material matter to Mr Howell was that Mr King was happy with the information. Mr Howell's reliance would have been on Mr King. His underwriting judgment consisted of a preparedness for commercial reasons to oblige Mr Forster and the fact that Mr King was on the slip. Mr Howell could not remember asking Mr Forster if this was a fac/oblig or a quota share.

Mr Howell said that ultimately he would have been told the business was coming from Mr Bullen. It was possible he was told that the EPI was derived from that contract. He could not say whether or not he was told or appreciated that the contract between Bullen and Aneco was fac/oblig as opposed to quota share.

Mr Howell believed that the word "proportional" in part 2 of the information sheet can include fac/oblig treaties.

Mr Howell said it certainly would have made a difference to the leader whether the Bullen/Aneco contract was fac/oblig as opposed to quota share --

. . . if my leader is not clear on that issue then I have to support my leader's view because I am writing those slips because my leader is happy to be on them.

Without Mr King's participation Mr Howell would not have supported the slip. He assumed that a fair presentation of the risk had been made to Mr King. If he had known or suspected that this was not in fact the case, he would have declined the business altogether. Because he was writing on an "obliged"/King's rating basis it did not matter whether the underlying arrangement was fac/oblig or quota share provided, Mr King, as the leader, was happy with the information that he had. If he had been told that a fair presentation had not been made to Mr King he would probably have reported the brokers to Lloyd's.

Mr Andrews

Mr Andrews was the underwriter of Gooda Walker Syndicate 298. He said that he knew nothing about what may or may not have been said by the broker who broked the risk to his deputy who wrote it. Mr Andrews said that the risk was probably promised by his deputy Mr Jonathan Wilson. (Mr Wilson subsequently gave evidence. Mr Wilson referred to the syndicate's records and in particular to the reference "SPN" which he said indicated that Mr Andrews wrote the risk. I consider that Mr Wilson supported by the records is probably right as to this). Mr Justice Phillips (as he then was) made a number of adverse findings against Mr Andrews in his judgment in Gooda Walker. These were put to Mr Andrews in cross-examination.

On the assumption that the underlying contract was with Mr Bullen and that it was a fac/oblig, Mr Andrews said this would have made him even more determined not to support the risk because "we have a particular hate against fac/oblig facilities". Mr Andrews said that if the Bullen/Aneco contract provided for a retention by Mr Bullen he would regard the contract as falling within the definition of "proportional". But Mr Andrews added that in his view if there was a retention it would not be a fac/oblig.

Mr Andrews said that if the risk was not fairly broked to Mr King as the lead underwriter it would have been material to him as an underwriter to know this. But he added that --

. . . we make our own judgments and we would have hoped that the broker would have made a full submission to our syndicate.

Mr Andrews did not give oral evidence at the arbitration because his wife was seriously ill at the time.

Mr Michael Delanoue

Mr Delanoue was the active underwriter of Ancienne Mutuelle ("AM") (now Axa Re) at the time. Mr Delanoue refreshed his memory by examining the underwriting file.

On 16 Dec, 1988 Mr Forster wrote to Mr Delanoue offering a share in the programme. He described Aneco's portfolio as --

. . . established Lloyd's underwriters who can quota share an evenly balanced spread of business . . . so far they have a firm contract through Norman Bullen's Lloyd's, syndicate, who as can be seen from the information sheet will be ceding middle to top layer business. As can be seen from the prices the layers are extremely well paid, bearing in mind the excess point is in excess of the projected income.

Mr Delanoue based his decision to participate upon the slips and the information in Mr Forster's fax and enclosures. He had no recollection of speaking to the defendants about this risk. The risk was placed entirely by correspondence.

Mr Delanoue's primary consideration in writing business of this nature was the pricing. He considered the rate on line to be attractive in view of the "evenly balanced spread of business" which was to be underwritten by Aneco and in view of market prices at the time. The risk had also been rated by Mr King who had a good reputation.

Subject to one point (see below) where there was an element of confusion, I was particularly impressed by the evidence of Mr Delanoue.

Mr Delanoue understood that AM was protecting an account which initially would consist of a quota share of Mr Bullen's marine excess of loss business, which was said to be evenly balanced, and which was intended to include other quota share risks of a similar spread. AM did not write individual fac/oblig contracts. Mr Delanoue understood that the EPI related to the whole of the anticipated book of business, and not just the Bullen contract. "Evenly balanced spread" meant to Mr Delanoue that there would be a mixed portfolio of specific covers.

If the EPI referred exclusively to Mr Bullen's estimated premium income Mr Delanoue would have expected to have been told this by the brokers.

Mr Delanoue said that fac/oblig contracts are more risky for the reinsurer than quota share contracts because they carry an inherent risk of anti-selection. In addition the reinsurer does not automatically receive a balanced portfolio because the cedant is able to pick and choose which risks he cedes and how much of each risk he cedes. AM had strict guidelines. The exclusion of fac/oblig was one. An excess of loss protection of a fac/oblig would be outside the guidelines.

After a passage in cross-examination where I believe Mr Delanoue was confused (possibly because of language difficulties) he confirmed that a treaty which otherwise has the characteristics of a fac/oblig, remains a fac/oblig despite the fact that there is a retention. Mr Delanoue agreed that a fac/ oblig contract is a form of proportional contract. He did not accept that the reference to "original rates on line of between 20% and 2%" in the information sheet indicated an unusual form of quota share.

Mr Delanoue said that if he had been told that the Bullen contract was a fac/oblig he would not have underwritten this programme at all. He did not write fac/oblig retrocession contracts.

Further if he had known that the presentation to Mr King had been unfair, and that Mr King had rated the risks on the basis of inaccurate information, he would not have agreed to subscribe to the programme.

Mr Emms and Mr Moody

The statements of Mr Emms and Mr Moody were admitted under the Civil Evidence Act.

Mr Ian Graham

Mr Graham is a claims adjuster at Maritime Insurance Co, part of the Norwich Union group. He gave evidence in relation to the allegation of affirmation (see below). Mr Graham referred to his

contemporary note in his own handwriting of his meeting with Mr Oliver and Mr Knox on May 23, 1995. He disputed the final words in J & H's note of the same meeting -- "would continue to pay claims if asked". It is likely that he said words to the effect "if claims were presented, then we would consider them" which is his normal practice. I prefer Mr Graham's evidence to the effect that he did not say "would continue to pay claims if asked". This is contrary to his own contemporary notes.

Mr Richard Wills

Mr Wills was the underwriter of Syndicate 593.

The syndicate's underwriting records include the words "writing proportional treaties of XL accounts . . . eg N Bullen". These words were written by the deputy underwriter. Apart from what appeared in the records, Mr Wills could not remember what was said at the time. He said that there seemed to be a gap which he could not fill -- the whole of the premium appeared to be Bullen and yet the brokers said that Bullen was only one of the contracts. Mr Wills relied quite heavily on the leader. He was not in a position to comment on the level of rating as he did not have a book of this sort of business to gauge it against. He considered the risk partly as a "reasonable punt" because he was writing a contract at 30 per cent rate on line which was having business ceded to it at an average rate of line (he thought) of 10 per cent Further at the time the defendants were new brokers in the market and to write a small line to a broker might have carried favour. The syndicate probably only had about half a dozen risks of this sort on the books.

Mr Wills believed that the word "proportional" can only refer to quota share treaties. Thus he believed that Aneco had entered into a quota share treaty which would protect Mr Bullen's excess of loss writings on higher layers of business. Mr Wills said that he had never heard fac/obligs referred to as proportional contracts. They could be so described but it would certainly be material information.

Mr Wills said that he had always been careful to avoid protecting fac/oblig writings and did not knowingly do so. This is because a cedant under a fac/oblig treaty will invariably use such a treaty to cede bad business to the greatest possible extent and retain as much good business as possible. Had he been told at the time the risk was presented that Aneco were in fact intending to protect their fac/oblig writings to Mr Bullen, he would not have entered into the contracts.

His decision whether or not to subscribe was influenced by the fact that Mr King had led each layer with a substantial line. He regarded Mr King as a good excess of loss underwriter and was happy to follow him. He assumed that a fair presentation of the risk had been made to Mr King. If he had known that this was not the case, he would not have written the contracts.

Mr Nigel Jenkins

Mr Jenkins is the managing director of Maritime Insurance Co Ltd, a Norwich Union company. He is also the chairman of the Institute of London Underwriters. He was the Norwich Union underwriter who subscribed a line (US$2 m excess US$6 m). Mr Jenkins had no independent recollection but was assisted by reference to his own notes which are not stored in computer form. Mr Jenkins supported by his own notes was an impressive witness.

Mr Jenkins' notes now stored in computer form read:

(NTJ) DGK/TGG/COP.RE/CIGNA RE: EPI $1.35M-1989. Protects LMX Quota. Pays well but TO Bkr Alastair Yardley.

These comments indicate that Mr Jenkins was the underwriter of the risk, that the two Lloyd's leaders were Mr King and Mr Green, whereas the two ILU leaders were Copenhagen Re and Cigna Re. The EPI was said to be US$1.35 m for 1989. The broker was Mr Yardley and Mr Jenkins recorded what Mr Yardley told him about the underlying business, namely that it was LMX quota share business. "TO" means "to oblige". Mr Jenkins was sure that he would not have written "LMX quota" if he had been told that the underlying business was fac/oblig in nature. He did not think he was told that there was only one underlying contract, since if he had known this, he would have asked the name of the cedant. He was fairly certain and he was not told Mr Bullen was the cedant. If he had been told this he would have recorded it. He believed that he took the EPI to relate to the whole of Aneco's anticipated book of

business.

Mr Jenkins said he would have noted his own record at the time onto a card which was subsequently processed onto the computer system. The general practice was that the underwriter would write the card up at the time he was writing the risk.

Mr Jenkins explained that if he had known it was Bullen he would have put the insured down as Bullen via Aneco or Bullen/Aneco. This was pertinent because the Norwich Union were also involved in other Bullen business, and he would have aggregated the contracts together.

If at the time the risk was broked to him, Aneco only had one firm contract, that contract accounted for the entire EPI and it was a fac/oblig of the Bullen syndicates he would have wanted to have been told these matters by the broker -- it would have coloured his judgment ("a fac/oblig contract of this nature was far more risky than a quota share"). Had he been told it was fac/oblig he would have noted this -- he could not say whether he would have still written the risk ("I cannot say one way or the other; because it was an "oblige" line I am not sure").

Mr Jenkins said that he would classify quota share treaties, surplus treaties and fac/oblig treaties as being of some proportional nature.

It is to be noted that Mr Jenkins wrote what was by Norwich Union standards a modest line (1.5 per cent) to "oblige". I consider that on the balance of probabilities had he known that the underlying book was a fac/oblig protection of Bullen he would probably not have written the risk.

Mr Jenkins took into account the fact that the risk was led and had been rated by Mr King. If he had known that the basis of the presentation of the risk to Mr King (or indeed any of the other leaders) had been unfair he would not have written the risk. Even though the line on this risk was written "to oblige" he was entitled to expect a proper presentation to be made to the leader.

The following witnesses were called by J & H.

Mr Paul Forster

Mr Forster had been employed as a placing broker for about 12 years in December, 1988. He became a director of J & H the following January.

I regret to say that I have grave reservations about Mr Forster's evidence. It may well be that he has turned this matter over in his mind so many times that he has now convinced himself that certain things were said or probably said when in fact they were not. I make the following general points about his evidence.

1. Mr Forster's evidence was inconsistent with the contemporary notes made by or on behalf of Mr King, Mr Adams, Mr Green and the Copenhagen Re.

2. Mr Forster said that on 6 Dec, 1988 he is certain that he would have shown Mr Crawley's telex of the same date to Mr King when he went back to Mr King with Mr Crawley's response. I cannot accept this evidence. It did not appear in any of the three witness statements that Mr Forster provided for the arbitration.

3. There were a number of instances where Mr Forster's evidence differed from his evidence to the Rose Thomson Young loss review and to the arbitrators.

I turn to mention some aspects of Mr Forster's evidence.

As to the one of the words "London market proportional contracts" in the information sheet Mr Forster said that he did not coin the expression; he thought people in the market would know what such business was. When it was pointed out to Mr Forster by the tribunal that he could have maintained flexibility by using the expression "London market proportional contracts" and at the same time have informed the market that the one contract in the pipeline was a fac/oblig, he agreed that he could have done that but felt that the way that he presented the information sheet was fair and accurate. He had

no intention whatsoever to misrepresent anything to underwriters.

Mr Forster accepted that it was particularly important that the market was informed that the entire premium income related to the Bullen tract. When asked why the overseas market was not told that the premium income related exclusively to Bullen, he said he thought that would be the inference.

Mr Forster agreed that he did not discuss the nature of the Bullen treaty with any of the leaders. He was, he said, totally focused in on what the underlying business was (middle to top layer excess of loss business). At no point did he tell Mr King that the Bullen contract was a fac/oblig. At the tribunal Mr Forster accepted that before Mr King could have learnt that the only business so far was a fac/oblig, he would have had to do a lot of detective work. Mr Forster said that he did not believe that Mr King, at the time, felt that the nature of the underlying contract itself was material. He would not have had to have done a lot of detective work, because he could have asked if he felt it was material. If Mr King was just gauging the risk by the information sheet and the verbal description, Mr Forster thought that he probably would have come to the conclusion that it was quite likely to have been a fac/oblig type treaty. Mr Forster said he did have some recollection of broking the risk to Mr King. The focus was entirely on the subject matter. This contract was really the conduit for bringing the excess of loss business into Aneco's books. Mr Forster accepted that there was a possibility that he used the expression "quota share", but in the context of explaining how cessions would be made. It was possible that he used the expression "quota share" to describe how the business was going to be ceded, but he did not use it as a way of describing the underlying treaty itself.

Mr Forster said that when he handed the broking of the following market to Mr Yardley, he did tell Mr Yardley that the EPI was solely derived from the Bullen account. He did not recall going into specific detail about the Bullen treaty. He did not recall giving Mr Yardley the Bullen file or the Bullen treaty to look at. Mr Yardley was given the slips, the information sheet and the quote sheet, but not the Bullen treaty.

As to the faxed letter to the overseas market Mr Forster disagreed with the suggestion that the letter indicated that there was a firm contract with Bullen, a quota share, which would produce an evenly balanced spread of business. Mr Forster said that the letter did not say that the Bullen treaty was a quota share. "Quota share" in that context was a way of describing how the business was going to be ceded. He did agree that there was an element of ambiguity and that with hindsight he might have rephrased that part of the letter. It was possible that when he drafted the letter to the overseas market it was intended to reflect the way the risk was broked to the lead underwriters. He may well have used the expression "quota share" to the lead underwriters in the sense of how Bullen was going to cede business to Aneco.

Mr Forster agreed that fac/oblig was an important characteristic of the Bullen treaty. It would be accurate to describe the Bullen contract as a fac/ oblig to the extent that it had fac/oblig characteristics.

Mr Forster told the Rose Thomson Young loss review that fac/obligs were not common due to limited market availability. He was not aware of many other markets for this type of business other than Aneco Re. Some of the traditional marine underwriters were not particularly keen on fac/ obligs, especially emanating from certain overseas reinsurers. But Mr Forster thought it very unlikely that there was an opportunity to select against Aneco in relation to middle to top layer excess of loss business. He never equated the expression "chute" with the Bullen contract. Some fac/obligs were used as a "chute", particularly for direct underwriters, such as hull underwriters. Some overseas reinsurers had abused fac/oblig covers. When asked --

. . . you knew that many underwriters would react adversely to any attempt to provide excess of loss protection for a fac/oblig?

Mr Forster replied "not with the market I used on the Aneco placement, no."

Mr Forster said there were a number of difficulties attached to placing the risk. The fact that the underlying business was fac/oblig was not an overriding difficulty; it was possibly a difficulty with some people.

As to the Bohling amendment Mr Forster was referred to the terms of the letters to the overseas market. When asked "what would you like to have seen that was not there?", he replied:

. . . the fact that it was a part of a section of a larger treaty, albeit overall a very small treaty.

I find that Mr Forster knew at the time of the presentations to ML King and others that Aneco did not want to write many more contracts than Bullen because the fac/oblig of Bullen was going to give Aneco "quite a lot of potential exposure".

I have set out my assessment of the various underwriters who gave evidence. Where there is a conflict between ML Forster's evidence and the evidence of those underwriters called by Aneco to whom Mr Forster presented the risk, I prefer the evidence of the underwriters. As pointed out above in several cases such evidence was supported by their notes/records made at the time.

Mr Alistair Yardley

Between 1981 and 1989 Mr Yardley was employed by J & H as a marine reinsurance broker. Between 1984 and 1989 his immediate superior was Mr Forster. Mr Yardley had no recollection of any specific conversations with any underwriters but said that he did recollect the approach that he made.

I have serious reservations about Mr Yardley's evidence. 1. Mr Yardley had no written instructions from Mr Forster as to how to broke the risk. 2. It is far from clear what Mr Yardley knew about the Bullen treaty. (See above as to Mr Forster's evidence about this.) 3. It is plain from the Norwich Union records that he told Mr Nigel Jenkins that the underlying business was LMX quota share business. 4. I reject (as an unjustified reconstruction) Mr Yardley's evidence (see below) that the emphasis of the presentations he made --

. . . would have been the fact that Bullen could cede business to Aneco, so long as it fell within the parameters on the information sheet. 5. I doubt whether he fully understood in 1988/1989 what was required to achieve a fair presentation of the risk.

In fairness to Mr Yardley I should point out that in 1988/1989 he was dependent on appropriate instructions from Mr Forster. I regret that in my view he did not receive such instructions. If, as seems likely, Mr Forster's briefing of Mr Yardley corresponded in part to what Mr Forster said in his letters to the overseas market, such briefing would have been at best ambiguous and probably misleading.

As to the presentation of the risk Mr Yardley did not broke the risk as a fac/oblig, but left it to the underwriters to evaluate it for what it was. Those underwriters that deduced that it was a fac/oblig did so as a result, not of anything that he said, but because of their perception of what it probably was. Mr Yardley did not recall telling any underwriter that the Bullen treaty was a fac/oblig.

Mr Yardley said that he explained that the reinsured was a Bermudan company which would be receiving business ceded to it under proportional contracts written by London market underwriters covering middle to top layer excess of loss business. He said he recalled explaining that Aneco had one contract in the pipeline with the Bullen Syndicates, under which Bullen could cede business within given guidelines to Aneco. He may have said at the time that there was a possibility that "Bohling may come on board" and that Aneco hoped that there would be further additional contracts to be ceded. He added:

I would have said, it is a very long time ago, but to the best of my recollection, I would have referred to that premium having emanated from Bullen.

Mr Yardley agreed that it was particularly important that, since the entire EPI related to the Bullen treaty, that was accurately represented to the market. He said he would have referred to that premium having emanated from Bullen. Mr Yardley agreed that there was nothing in any of his witness statements to the effect that Mr Forster told him that the EPI related exclusively to Bullen. He could not remember whether he was told that or not, but he took it that the EPI was from Bullen because at that time he was the only person who was ceding business to Aneco.

Mr Yardley said that he was not familiar with the terms of the Bullen contract. He said he knew the

bare bones of the Bullen treaty, that there was proportional market business and that there was a retention of 20 per cent. When asked whether the Bullen treaty was a fac/oblig or not, he said it had a fac/oblig nature about it. Mr Yardley agreed that excess of loss protections of fac/obligs in late 1988 would not be attractive to some people in the market -- "fac/oblig has always had a slightly less palatable feel about it". Mr Yardley said that protections of fac/obligs were not commonplace. In 1988/1989 he was not involved in the broking of many protections of fac/obligs.

As to the Bohling amendment at one point Mr Yardley said:

I only really specifically recollect the aviation part, although I knew that it was a constituent part of a marine treaty.

Later he said "I was told at that time, that there was a specific aviation treaty". He did not know that the Bohling treaty did not contain the parameters 20 per cent to 2 per cent. If he had been aware of this, it is something that he would have wished to communicate.

As to Mr Forster's letter to the overseas market Yardley said it could be a bit misleading or ambiguous, but that is obviously not the intention", adding that with the benefit of hindsight it could have been expressed "a lot better".

On the assumption that the information sheet had stated that the EPI was derived from the only contract so far obtained, a contract with Mr Bullen of a fac/oblig nature, Mr Yardley said he did not feel that this would have made much difference to the reaction on the lines that he obtained.

Where there is conflict between Mr Yardley's evidence and the evidence of those underwriters called by Aneco to whom Mr Yardley presented the risk, I generally prefer the evidence of the underwriters.

Mr Terence Panter

In late 1988/early 1989 Mr Panter was an underwriter for Syndicate 1121. He was previously employed by INA between 1977 and 1988 as an underwriter. Mr Panter had 45 years' experience in the market.

Mr Panter was called by J & H to give evidence.

Mr Panter said that he could not recollect precisely what Mr Forster said to him when making the presentation, but he thought it unlikely that Mr Forster told him anything about the specific nature of the Bullen contract. His recollection is that Mr Forster concentrated in his presentation on the nature of the business to be ceded. Mr Panter deduced that the Bullen treaty was of a fac/oblig nature. This is shown by the notation on his contract work sheet written by his then assistant -- "at present Fac/Oblig for Bullen". Mr Panter said that his experience at the INA possibly helped him to make the deduction. Another thing that helped him was the size of the income. If it had been a quota share he would have expected the income to be greater. He added --

. . . we have been seeing these types of contracts over many years and I think it just comes with experience . . . I just felt this was a fac/oblig.

Mr Panter regarded the presentation of this risk by Mr Forster as fair. Mr Panter said there was an element of "oblige" in writing the risk.

As to fac/obligs Mr Panter said there was an aversion in the market to fac/oblig contracts towards the end of the 1980s because of the risk of anti-selection. A lot of people at that time did not write/like writing XLs of a fac/oblig treaty. Most people in London did not want to write fac/oblig treaties but there were some people that would write the XLs and others that would not.

Mr Panter said that if the risk had been misbroked to Mr King that was something he should have been told about --

. . . if the leader or the leaders . . . were misled, I would be very upset about participating on those contracts.

Mr Panter was asked, on the assumption that the risk had been expressly presented as an XL protection of a fac/oblig treaty, whether he would have expected J & H to have been able to complete the placement of the six layers. He said that he knew it was probably difficult at the time, but would have thought eventually they would have placed them.

Mr Panter did not give evidence before the tribunal.

Mr Stephen Oliver and Mr Mark Knox

Mr Oliver has been a board director of J & H since January, 1989. Mr Knox has been employed by J & H as a senior claims broker since September, 1988.

Mr Oliver and Mr Knox gave evidence as to meetings with Mr Graham (the claims adjuster at the Maritime) on 23 May, 1995 and with Mr Staples (claims manager of the Copenhagen Re) on 24 May, 1995. This evidence was relevant to the allegation that Mr Graham and Mr Staples affirmed the contracts (as to which see below).

Mr Knox's note of the meeting with Mr Graham recorded --

. . . he will send a copy of the Coopers & Lybrand letter dated l May 1995 to his Head Office, accounts department, and await their comments. Would continue to pay claims if asked.

His note of the meeting with Mr Staples read:

. . . he said that if the monies were returned it would commercially be a "good thing" but he also said that if further collections were presented then Copenhagen Re would honour them.

Mr Oliver's note of the same meeting read --

. . . he jokingly said that any money returned to Copenhagen Re was most welcome but confirmed that he had recovered these losses from Copenhagen Re reinsurers and would be happy to continue settle claims to this contract if asked.

I have a number of reservations about this evidence.

1. Mr Oliver said:

I though we had a duty to the market, to provide each reinsurer with a copy of Aneco's letter dated 1.5.95, and to explain in essence, the findings in the award. I prepared a manuscript note of the points that I wished to cover at each meeting . . .

I refer to Mr Oliver's manuscript notes. It is surprising that such notes prepared in advance of meetings with the companies market should start

. . . Representatives of Johnson and Higgins Ltd met with the London companies . . . [emphasis added.]

2. A copy of the award was delivered to Mr Oliver by his solicitors on 3 Apr, 1995. Even if it be assumed that Mr Oliver's notes contain an accurate summary of what he said about the award at the various meetings, such a summary, as he was forced to concede, was a seriously incomplete account of the central findings of the tribunal. 3. On any view Mr Graham and Mr Staples were presented with a materially incomplete account of the central findings of the tribunal. 4. There are marked similarities between Mr Oliver's and Mr Knox's notes. It is plain that one must have drawn on the notes of the other because of the similarities in language. 5. Mr Graham and Mr Staples were able to refer to their own contemporary notes in their own handwriting. I prefer their recollection of the relevant meetings based on their notes, to the evidence of Mr Oliver and Mr Knox. 6. Having regard to their respective positions, I think it most unlikely that Mr Graham and Mr Staples would have taken upon themselves the decision whether or not to affirm the contracts. The overwhelming probability is that they would have indicated an intention to refer this question to their superiors. Some indication of this is found in

part of Mr Knox's note of the meeting with Mr Graham. 7. If Mr Graham and Mr Staples had unreservedly indicated an intention "to pay claims if asked" it is surprising that J & H did not confirm this in a subsequent letter. 8. I was not impressed by the way Mr Oliver and Mr Knox gave evidence.

The expert witnesses

Mr Tony Berry

Mr Berry was called by Aneco as an expert marine excess of loss underwriter with particular experience in the underwriting of LMX business.

Mr Berry is chief executive officer of Cotesworth & Co Ltd and active underwriter of Syndicate 536 at Lloyd's. He has been underwriting marine reinsurance business for 27 years and has been the active underwriter of Syndicate 536 since 1983. Mr Berry wrote about 35 per cent of his stamp capacity in 1988 and about 52 per cent in 1989.

Mr Berry is a thoroughly practical underwriter who benefited from a good apprenticeship and who continued to apply the principles he had learned in the 1960s, following Hurricane Betsy. I was particularly impressed by Mr Berry's evidence.

At one point in his cross-examination Mr Berry was confused by the assumptions he was invited to consider but his evidence was clarified in re-examination.

Mr Berry said --

. . . over the years one has got quite used to fac/obligs being dressed up to appear to be something they are not.

Mr Brian Wood

Mr Wood was called by J & H as an underwriting expert.

Mr Wood was the chief marine and aviation underwriter of the Norwich Winterthur Reinsurance Corporation Ltd until June, 1993. Mr Wood's experience in the Lloyd's market was limited. He had never been a marine underwriter in the Lloyd's market.

I found Mr Wood's evidence as to alternative security generally sensible. I have marked reservations about Mr Wood's evidence on other central issues. By way of example only I list the following points. 1. Despite the statements in his reports to the contrary, Mr Wood, following a meeting with Mr Berry, agreed (i) that the Bullen contract was a fac/oblig and not a "hybrid"; (ii) that most fac/obligs (if not all) contain retention provisions; (iii) that while the underwriting of worldwide whole accounts and XL on XL were, with the benefit of hindsight, not well underwritten, the product itself was not flawed; (iv) it would be possible to administer a limited quota share. 2. Mr Wood accepted that Mr King would have expected on a quota share to have got whole specifics and some cargo specifics, being part of the whole of Mr Bullen's book. When it was pointed out to Mr Wood that with a fac/oblig Mr King was getting XL on XL and whole accounts with a high proportion of XL on XL, Mr Wood said that Mr King knew this with hindsight but this need not have been the case. 3. When Mr Wood was asked what his reaction would have been as leader if the risk had been broked to him as a quota share, his answers were in my view unrealistic. He said:

. . . my contract was with Aneco . . . and any damage that I suffered I would have sought reparations from Aneco . . . I would seek increased premiums, improved terms on the renewal, assuming they were still in business.

4. Not only did Mr Wood accept (after an explanation by Mr Berry as to Lloyd's reference systems) that contrary to par 7.4 of his main report it would be possible to administer a limited quota share, but Mr Wood in addition accepted that he was wrong in stating that Mr Bullen had no computer system. 5. In par 13.2 of his main report Mr Wood said --

. . . it was my experience at the time in question that, when I spoke to my own proportional reinsurers .

. . that foreign reinsurers, no matter how good their mastery of the English language, use the London market "shorthand" of quota share for any type of proportional treaty.

When cross-examined Mr Wood accepted that Mr Forster's letter to the overseas market was thoroughly ambiguous. When asked why he did not state this in his report he said "it did not occur to me at the time". In my opinion par 13 of the main report provides a clear example of a failure on the part of Mr Wood to follow the principles set out in The Ikarian Reefer, [1993] 2 Lloyd's Rep 68 at 81.

Without purporting to summarize the whole of Mr Wood's reports and evidence it is convenient to refer to some of the particular points he advanced when giving evidence.

Mr Wood said that the method of cession, by which a reinsured participates in business, is of no relevance or materiality to the underwriter who is invited to provide protection, because the Aneco programme, adding up to US$7.8 m, is the total limit of the aggregate. With XL on XL, you cannot have better quality exposure or lower quality exposure.

Mr Wood accepted that there was an obligation on the broker to tell the underwriter that there was one contract in the pipeline and that it was Bullen. But the broker did not have the obligation to go further and say that the contract with Bullen was a fac/oblig. Whether the contract was fac/oblig or quota share was irrelevant. Mr Wood said that not everybody in the market would be equally happy with Mr Bullen operating a fac/oblig as opposed to a quota share. Mr Wood accepted that if the intention had simply been to write Bullen and no other treaties it would have been material to disclose that the Bullen treaty was fac/oblig. Whereas Mr Bullen used the treaty to cede largely XL on XL and whole account XLs, Mr Wood said this was not against Aneco because the XL on XL business "by and large, was better paid . . . than other classes." But he conceded that some people thought this was attractive business and others took a different view. Mr Wood further accepted that Mr King was deprived of the opportunity of making up his own mind whether he wanted business at the top or not. Mr Wood also agreed that although a spread of business could not be guaranteed under a quota share, it was far more likely that you would get a spread with a quota share than a fac/oblig. Mr Wood also accepted that in terms of what should he disclosed to prospective excess of loss reinsurers what Mr Bullen actually did is not relevant -- what was relevant was what Mr Bullen was entitled to do, namely select which risks he wanted to cede. What Mr Bullen actually ceded to Aneco was missing the point.

Mr David Knight

Mr Knight was called by Aneco as an expert broker.

Mr Knight has worked in the marine insurance field for 32 years. From 1982 to 1995 he worked as a placing broker in the London marine market, specializing in placing marine reinsurance business with insurance/reinsurance companies and Lloyd's syndicates on behalf of various clients. Mr Knight was a member of the Equitas major catastrophe team (1992 and prior years). Mr Knight was not a specialist in XL on XL and XL on whole account business and this should be borne in mind in considering his evidence as to alternative security. Subject to this I was particularly impressed by Mr Knight's evidence as to what was required from a broker in the present case to ensure a fair presentation of the risk. Mr Knight's evidence on this aspect of the case was logical and consistent and made commercial sense. Mr Knight emphasized "if there is any doubt, the prudent broker will disclose."

Mr Knight said he had never heard any overseas insurer or reinsurer use the expression "to quota share" to mean anything other than to quota share.

Mr Knight said:

I do not believe that a broker can reasonably take the view that the fact that the contract is fac/oblig is immaterial or in some way less material because we are speaking of excess of loss business. The experienced broker would know exactly how underwriters in the London market perceived fac/oblig contracts. He may consider them mistaken in their perception. He may correctly consider them mistaken in their perception, but he would know how they perceived them and, therefore, it cannot be immaterial . . . the perception in December 1988 of (a) fac/oblig treaty covering whatever business, was that it was bad because of anti-selection. I am afraid Mr Bullen proved, ultimately, that the underwriters were right, did he not?

Mr John Beer

Mr Beer was called by J & H as an expert broker.

Mr Beer was the founder of a Lloyd's broking company in 1977 under the Stewart Wrightson umbrella. He ended his specialization as a broker in late 1988 when he resigned as managing director of Hogg Robinson Reinsurance Brokers. Mr Beer's role after 1980 was as a supervisor as opposed to somebody actually doing the broking. His experience was mostly non-marine. He accepted that the marine brokers and underwriters tend to view some matters somewhat differently.

I found Mr Beer's evidence as to alternative security generally sensible. I have marked reservations about Mr Beer's evidence on other central issues. By way of example only I list the following points. 1. I was not satisfied that Mr Beer at all times approached his evidence in accordance with the principles set out in The Ikarian Reefer sup. 2. At one point in his evidence Mr Beer said --

. . . I think that you are entitled to describe a treaty which operates in a slightly different way in the best possible way you can. I accept that that may lead to some confusion, but it has to be established by the underwriter, asking you just what you mean by this particular . . .

3. As to the placing information to the overseas underwriters Mr Beer said in par 11 of his main report --

The faxes sent to the overseas market . . .appear to me to be a reasonable description of the general characteristics of this risk when taken with the attachments . . . the faxes use the phrase "who can Quota Share" which, in this context, would indicate that the relevant underwriters would cede Aneco with a proportional share of their XL portfolio . . . with hindsight Forster agrees that a different wording might have been better. However, the supporting enclosures sent with these faxes would have clarified the position . . . I would consider that experienced professionals in the overseas markets would have a fair and accurate description of the risk they were being offered.

The note of the meeting between the expert brokers recorded agreement that "who can Quota Share" might mislead but disagreement as to whether the supporting information would clarify the position. When cross-examined Mr Beer said:

If I was an overseas underwriter . . . I would have hoped that I would have picked that up and said what do you mean by quota share . . . I would have read it as ambiguous . . . probably some of (the overseas market) would assume that (it was a quota share they were being offered) . . .

I consider that par 11 of Mr Beer's report went beyond what was justified in an attempt to defend the placing information to the overseas underwriters. 4. In par 9.5 of Mr Beer's main report he said:

. . . it would therefore have been clear from Aneco's information sheet that it was highly unlikely, if not impossible, for any underlying contract to be a fixed quota share of the whole or even part of the cedant's account if it were to comply with the rate on line band of 2-20% and the exclusions and limits set out. Even with a sophisticated computer system, which was still comparatively rare in 1988, it would have been difficult for a cedant to code his writings to accommodate all these factors. Mr Wood describes these difficulties in his report with which I concur.

The notes of the meeting between the expert brokers recorded --

. . . Underwriting parameters on information sheet make quota share unlikely -- no agreement.

When cross-examined Mr Beer accepted that it would not have been difficult for a cedant to code his writings. He further conceded that the exercise of isolating the risks that fall between 2 per cent and 20 per cent would have to be done whether it was a quota share or a fac/oblig. 5. In his main report Mr Beer expressed his opinion on certain assumptions as to the verbal discussion between the broker and the underwriter. The second assumption was that the broker told the underwriter that Mr Bullen could quota share business to Aneco. As to this assumption Mr Beer said:

This would be reasonable for the broker to refer to the underlying cessions as being "quota'd" or even "quota shared" to the XL reinsurers in a fair shorthand attempt to explain the nature and flexibility of the arrangement . . . it has always been, and still is, London market practice that brokers and underwriters would devise shorthand codes in the market . . . "Q/S" would be a convenient abbreviation for "proportional" contracts, particularly if that described the method of cession.

When cross-examined Mr Beer's evidence was as follows:

[Q] If (Mr Forster) had said that the underlying cessions are quota'd or even quota shared, when in truth it is a fac/oblig, are you seriously telling this court that that is a fair . . . [A] No, he is talking about the overall nature of the treaty here. We are talking about how the business is ceded and it is ceded on a 20%/80%.

[Q] Does this not suffer from the same ambiguity as the overseas market if this is what Forster said to King and others? [A] I do not think so, no.

[Q] I . . . suggest to you this part of your evidence like other parts, is wholly untenable. [A] No, I think it is a reasonable attempt to explain how a broker was trying to describe a rather difficult placing and treaty . . .

These passages from Mr Beer's main report and his cross-examination again demonstrate that at times he was prepared to go beyond what was reasonable and sensible to seek to defend J & H.

Analysis and conclusions

The 30 Lloyd's syndicates whose members were the respondents in the arbitrations are listed in Schedule 1 to the re-amended points of claim.

As to the London companies market and the overseas market:

To date four Companies market reinsurers have purported to avoid their participation: Prudential/Pearl; Norwich Union/Maritime; Copenhagen Re/Athel Re/Norse Re/Reinsurance Corp of New York Ltd; and Axa Re/Ancienne Mutuelle.

The overseas market who subscribed to the risk were as follows:

Stockholm Re, Fortress Re/Chiyoda/Taisei/Fuji/ Nissan, Laurentian General, RMCA, ICS, Kemper, CER and Ancienne Mutuelle.

The relevant legal principles

1. The relevant sections of the Marine Insurance Act, 1906 provide:

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18. (1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely: (a) any circumstance which diminishes the risk; any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) any circumstance as to which information is waived by the insurer; (d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty . . .

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer -- (a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and (b) Every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.

20. (1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it is untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded . . .

91. (2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

2. Section 18 is directed to what would have been the impact of the disclosure on the judgment of the risk by a hypothetical prudent insurer. (Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd, [1984] 1 Lloyd's Rep 476 at p 492, Lord Justice Kerr.)

3. Whether at Lloyd's or in the companies market the essence of the presentation to underwriters lies in summaries by brokers, both in writing and orally, of the material facts which in their view require to be disclosed to underwriters in fulfilment of the obligations of disclosure under ss 18 and 19. The London market practice and the law are based on the requirement of a fair presentation of the risk. (CTI v Oceanus sup at p 496, Lord Justice Kerr.)

4. A circumstance may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on the prudent underwriter's decision whether to accept the risk and if so at what premium (Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd, [1994] 2 Lloyd's Rep 427 at p 452, col 2; [1995] 1 AC 501 at p 550C, Lord Mustill).

5. If the misrepresentations or non-disclosure of a material fact did not in fact induce the making of the contract (in the sense in which that expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract (Pan Atlantic sup at 452, col 2; p 550C, Lord Mustill).

6. The assured will have an uphill task in persuading the Court that the withholding or misstatement of circumstances satisfying the test of materiality has made no difference. There is a presumption in favour of a causative effect. (Pan Atlantic sup at p 453, col 2; p 551C, Lord Mustill.)

7. If a particular fact is material for the purposes of ss 18(2) and 20(2), so that a failure to draw the underwriter's attention to it distorts the fairness of the broker's presentation of the risk, then it is not sufficient that this fact could have been extracted by the underwriter from material which was cursorily shown to him. On the other hand, if the disclosed facts give a fair presentation of the risk, then the underwriter must enquire if he wishes to have more information. (CTI v Oceanus sup at p 497, Lord Justice Kerr.)

8. J & H acted as Aneco's agents in obtaining quotes for and placing the excess of loss reinsurance. It was an implied term of the contract between Aneco and J & H that J & H would act with reasonable care and skill in and about obtaining quotes for and placing the excess of loss reinsurance. J & H owed a like duty to Aneco in tort.

9. In order to act with reasonable care and skill in and about obtaining quotes for and placing the excess of loss reinsurance, it was necessary for the brokers to make a fair presentation of the risk.

10. A broker must ascertain his client's needs by instruction or otherwise. He must use reasonable skill and care to procure the cover which his client has asked for, either expressly or by necessary implication. If he cannot obtain what is required, he must report in what respects he has failed and seek his client's alternative instructions (The Superhulls Cover Case, [1990] 2 Lloyd's Rep 431 at p 445, Mr Justice Phillips).

11. As to affirmation, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with knowledge of the facts giving rise to the right. His election once made is final; it is not dependent upon reliance on it by the other party (The Kanchenjunga, [1990] 1 Lloyd's Rep 391 at p 399, Lord Goff). A defendant will have affirmed the contract if (i) with knowledge of the facts giving rise to a right of avoidance for misrepresentation or non-disclosure and (ii) possibly with the knowledge of the right of avoidance itself, he acts in a way which is only consistent with an intention not to treat the contract as at an end (Pan Atlantic sup [1992] 1 Lloyd's Rep 101 at 106, Mr Justice Waller).

Definitions

The experts all agreed that "proportional reinsurance" or "proportional contracts" would be generally understood by marine underwriters and brokers in the London market to mean one of the following:

(a) "Quota Share Treaty" reinsurance -- the reinsured is obliged to cede and the reinsurer is obliged to accept, a fixed proportion of all business protected by such Quota Share. Premiums and claims are paid in exactly the same proportion, except that the reinsurer will pay brokerage to the intermediary and may offer the reinsured an overriding commission.

(b) "Surplus Treaty" reinsurance -- differs from "Quota Share", in that the reinsured only cedes that business where his participation exceeds a certain monetary amount. Thereafter, a "Surplus Treaty" operates in exactly the same way as a "Quota Share Treaty".

"Facultative/Obligatory Treaty" reinsurance -- the reinsured may select either those risks he wants to cede, or what proportion of his participation in each risk he wishes to cede, or a combination of the two. This is the "facultative" element. The reinsurer is obliged to accept these cessions and this is the "obligatory" element. Premiums and claims are thereafter dealt with in precisely the same manner as in "Quota Share" and "Surplus" Treaties and for this reason, this type of Treaty may fairly be described as a form of "Proportional Reinsurance".

Although I follow the agreed evidence for the purposes of this judgment I should point out in fairness to a number of underwriters who have expressed different understandings of the words "proportional contracts" that the textbooks do not present a consistent picture (see for example Marine Reinsurance -- Brown and Reed (1981) p 177 -- "A proportional treaty can be obligatory or 'facultative/obligatory'"; Reinsurance -- Carter (2nd ed, 1983) pp 76 and 77 and (3rd ed) pp 80-89 and 302-305 including in particular figure 3.6 (Proportional Reinsurances -- quota share and surplus); The Law and Practice of Reinsurance -- Golding (1987) p 36:

. . . Proportional, or sharing, forms of reinsurance of which the principal types consist of surplus reinsurances and quota share reinsurances . . .

Reinsurance for the Beginner -- Bellerose (1987) 12 diagram of proportional and non-proportional -- proportional = quota share, surplus and fac/oblig; Reinsurance In Practice -- Kiln (1991) pp 14-15 and 103-105; Principles of Reinsurance -- Chartered Insurance Institute (1991):

Facultative obligatory reinsurance arrangements are contracts which combine some of the principles of both the facultative and the treaty methods of proportional reinsurance.

(As to pure "Facultative" reinsurance -- protecting one specific original contract or risk this is regarded as "quasi-direct" and not at issue here.)

The words "Special Priority Treaty" have no established market meaning.

The Bullen contract in this case was a fac/oblig and not a hybrid. Most fac/obligs (if not all) contain retention provisions.

A fair presentation of the risk and material circumstances

J & H's case as to materiality included the following central argument. XL on XL writing involves making essentially arbitrary judgments on the likelihood of a catastrophe of the relevant size occurring, not in the period of insurance, but over a period of years. The opacity of the risk prevents the underwriter from making any informed assessment of it (see chapter 2 of the Walker Report). Writing catastrophe business is a huge gamble because the exercise of predicting whether a catastrophe of the relevant size will occur during the period of insurance is as reliable as haruspication. On this topic no underwriting judgment is possible. In addition the spiral works in a manner which is capricious and entirely unpredictable. XL on XL business, as operated in 1988 was, in any event, flawed. The rating methodology was rudimentary. In all the circumstances it was not material to the prudent underwriter in the position of Mr King whether the Bullen treaty was fac/oblig or quota share and whether the premium was derived from one treaty or many.

My findings as to a fair presentation of the risk and material circumstances are as follows.

The Bullen treaty was a fac/oblig treaty. With a fac/oblig treaty, the reinsured has the right to select which risks he wishes to cede to that treaty and the reinsurer is obliged to accept those risks. This contrasts with a quota share treaty where the reinsured is obliged to cede, and the reinsurer has to accept, those risks covered by the quota share treaty. The Bullen treaty could not fairly be described as a quota share treaty. At the time of the presentations the only treaty that Aneco had formed an intention to write (or had written) was the Bullen treaty (and it accounted for the entire EPI). The brokers should have disclosed that the only treaty that Aneco had formed the intention to write (or had written) at the time of the presentations was a fac/ oblig treaty of the Bullen syndicates. This should have been disclosed even if it was anticipated that Aneco might participate in and wish to reinsure other business at some later date. A fair presentation of the risk required disclosure that the underlying business at the relevant time consisted of a fac/oblig treaty for the NT Bullen syndicates, covering excess of loss business where the rate on line of the original contract fell between 2 per cent and 20 per cent. Further the information sheet stated --

. . . 1. Estimated Premium Income US$1,200,000 to US$1,350,000 2. Aneco intend to participate in London market proportional contracts covering excess of loss business having original Rates on Line of between 20% and 2% . . .

This gave the impression that the EPI was derived from a number of contracts. The way the EPI was put in par I would not indicate that such premium would be received under one fac/oblig treaty from NT Bullen only and this should also have been disclosed by the brokers.

As to the circular to the overseas market Mr Forster accepted that there was an element of ambiguity. This understated the position. An underwriter overseas reading the presentation would probably have reached the conclusion that the NT Bullen contract referred to was a quota share contract. The matters referred to above should have been disclosed to the overseas market. The presentation to the overseas market was seriously misleading.

As to materiality:

1. The business contained in the Aneco account would be material to a prudent underwriter. As the only treaty that Aneco had formed the intention to write (or had written) at the time of the presentations

was the Bullen treaty, this was material and should have been disclosed, along with the fact that it was a fac/oblig treaty with the inherent risk of anti-selection against reinsurers. What was relevant was what Mr Bullen was entitled to do, namely select which risks he wanted to cede.

2. A prudent underwriter may not be content to protect the reinsured under the (one) underlying treaty (to date) because he may not agree with the underwriting philosophy being adopted by the reinsured.

3. Likewise, the description of the treaty itself is equally important because in the case of a quota share of an established excess of loss leading underwriter, the probability would be that the quota share would be protecting an account which was fairly well spread geographically. Because of the selection of business which could be ceded under a fac/oblig treaty, the fear would be that all the liability ceded would become a total loss in the event of a major catastrophe occurring. The spread of business across the excess of loss underwriter's book is highly material. In the case of a quota share treaty, the reinsured is obliged to cede a percentage of all risks within the class written (eg with rates on line of between 2 per cent and 20 per cent) whereas with a fac/oblig he can choose which to cede. A quota share, therefore, could include cessions on overseas contracts which may be very unlikely to clash, or indeed, expose the excess of loss protections. There is a difference between the spread a prudent underwriter might anticipate with a quota share on the one hand and a fac/oblig on the other. As Mr Berry put it --

. . . if you have a quota share of risk . . ., you would have to cede, because it is obligatory, . . . New Zealand yachts . . . or Bulgarian hulls, or worldwide international business, that fell between the rates on line definition, of which there could be quite a considerable amount, whereas with a fac/oblig, that business which . . . was and still is, much sought after by excess of loss underwriters, would be more likely to be retained in the account and not ceded to a fac/ oblig reinsurer.

Mr Berry added --

. . . You would get a rate on line of 20% quite frequently on a substantial amount of business emanating from overseas . . . yachts, XLs out of New Zealand or hull XLs from different countries in the world where you may not have enormous fleets, cargo business out of the Middle East, and many, many examples of business.

4. I refer to the extensive evidence set out above from numerous underwriters as to the perception of fac/oblig treaties and protections of fac/oblig treaties. Without prejudice to the effect of the totality of this evidence, it is convenient to refer in particular to Mr Berry's agreement with the following passage from the interim award:

From the point of view of a reinsurer, fac/oblig treaties are generally regarded as less attractive than quota shares. One reason is the self-evident risk, usually described as the risk of "anti-selection", that the reinsured may select for cession the more dangerous or less attractive risks, whether in terms of exposure or premium or both, and retain the best part of the business for himself. In extreme cases, in market parlance, a reinsured may use a fac/oblig as a "chute" for business which he would not have taken, but for the knowledge that he can get rid of it to his reinsurer. Fac/obligs are therefore substantially more difficult to place than quota share treaties . . . a quota share is likely to provide a wider, generally safer, and therefore better, spread of reinsured business, both in terms of risk and of premium, than any form of fac/oblig. By reason of the discretion allowed to the reinsured in selecting the risks to be ceded, the danger of a fac/oblig is that the type of cessions made might be inferior in the perception of the reinsured.

The arbitrators (in my view correctly) continued

The reinsurer might fear that he would get an unbalanced share of the risks available, that the risks ceded might be the less well rated ones, or, in an XL account, that they might not be within the ROL range anticipated.

5. Although the LMX market was very much rate-on-line driven during the late 1980's Mr Berry did not accept the contention that no attention was or could be paid to the underlying business. He said there was good business and bad business in every class of business including XL on XL. XL on XL was not all the same. XL on XL was more likely to be the major class of business ceded if the contract was a

fac/oblig as opposed to a quota share.

6. Mr Berry adopted as correct the following further passage from the interim award:

The characteristics of excess of loss portfolios may . . . be seen to vary widely, because individual underwriters may, for good reasons, tend to favour different parts of the spectrum of the ROL range. Some will be attracted to working layers, others to the higher layers or perhaps to combinations of, say, middle to higher layers.

An XL reinsurer of a portfolio of excess of loss business will therefore be concerned to have information about the reinsured's ROLs applicable to the subject matter to be protected, and it is then a matter of individual underwriting judgment what layers are considered attractive or disadvantageous. However, it is clear that reinsurances of higher layers alone, with low ROLs are regarded by many underwriters as less desirable than an account with a "spread" of business including some lower layers with lower aggregate exposures and higher rates of premium. The greater the spread of a varied portfolio, the more attractive the risk to a prospective reinsurer.

Thus the spread of business across the excess of loss underwriter's book is material.

7. The aggregate exposure to Aneco under the Bullen treaty was material to the excess of loss reinsurers.

Having carefully considered all the evidence in the case I find that the brokers should have disclosed the following material circumstances: (i) that the only treaty that Aneco had formed the intention to write (or had written) at the time of the presentations was (ii) a fac/oblig (iii) reinsurance of the Bullen syndicates and that (iv) the whole of the EPI (US$1.2 to US$1.35 m) was derived from this (one) fac/oblig treaty.

To the extent that J & H failed to disclose all (or some) of the above material circumstances, they failed to act with reasonable care and skill.

(I will consider separately below the non-disclosure to the following market that Mr King's subscription to the risk and his rating of it were obtained by misrepresentation/non-disclosure.)

(1) J & H misrepresented to Mr King, the lead underwriter, to Messrs Adams, Green and Winter and to the underwriters for Copenhagen Re and Norwich Union, that Aneco had written or intended to write a quota share of Mr Bullen's account (as opposed to a fac/oblig treaty, as was in fact the case). J & H also misrepresented to the overseas market and in particular to Mr Delanoue of Ancienne Mutuelle that the Bullen treaty was a quota share reinsurance.

In truth and fact Aneco intended to write or had written a fac/oblig of Mr Bullen's syndicates.

I have no hesitation in finding that J & H misrepresented to Mr King, the lead underwriter, to Messrs Adams, Green and Winter, and to the underwriters for Copenhagen Re and Norwich Union/Maritime, that Aneco had written or intended to write a quota share of Mr Bullen's account (as opposed to a fac/oblig treaty, as was in fact the case). J & H also misrepresented to the overseas market (and in particular Mr Delanoue of Ancienne Mutuelle) that the Bullen treaty was a quota share reinsurance.

I emphasize that I have reached these conclusions having carefully considered all the evidence in the case, taking into account my assessment of the witnesses.

It is to be noted that these conclusions are consistent with the contemporary underwriting records/notes -- (i) Mr King: "X/L a/c iro NTB Q/Share". (ii) Mr Adams:

1-Only business written at moment -- Q/S of Synd 255 (NTB)

2-Only X/L Tty written at the moment -- Q/S of NTB

3-Q/S of Synd 255 (NTB)

4-Only busy at the moment -- Q/S of Synd 255 (NTB)

(iii) Mr Green "Prem Derived from Q/S of NTB".

(iv) Mr Winter:

Basically XL on NT Bullen XL quota share.

XL on basically NT Bullen XL quota share.

XL on basically NT Bullen XL quota share.

(v) Mr MacKenzie of the Copenhagen Re "XL A/C 100% LMX (QS of N Bullen)" four times.

(vi) Mr Jenkins of the Norwich Union/Maritime: (NTJ) DGK/TGG/COP. RE/CIGNA RE: EPI $1.35 M -- 1989 protects LMX quota. Pays well but TO Bkr Alastair Yardley.

[Although Aneco very properly do not rely on this in light of Mr Emms' evidence to the arbitrators, I record for completeness that Syndicate 836's underwriting information written onto copy slip included: "Aneco Re U'Writing Ltd (QS of NT Bullen") twice.]

In the circular letter to the overseas companies market in December, 1988 Mr Forster stated:

. . . Aneco have now taken the view that they would like to participate in Marine Excess of Loss Business by way of following established Lloyd's underwriters who can Quota Share an evenly balanced spread of business to them. So far they have seen a firm contract through Norman Bullen's Lloyd's Syndicate, who as can be seen from the information sheet will be ceding Middle to Top Layer Business . . .

Despite the efforts by and on behalf of J & H to defend this passage, it was plainly a misrepresentation in the context of the presentation to the overseas market.

Mr Forster accepted in cross-examination that it is possible that when he drew up the circular to the overseas market it was intended to reflect the way he broked the risk to the lead underwriters. This admission by Mr Forster confirms my conclusions set out above as to the misbroking of the risk. When considering the broking of the risk to others it is important to remember these conclusions and that Mr Yardley (who for example broked the risk to Mr Jenkins of Norwich Union/Maritime) was dependent on information and instructions received from Mr Forster.

It is convenient to refer at this point to three J & H documents: An undated J & H document entitled:

Risk Summary 12 mos @ 1.1.89 [states] Client/Reinsured NT Bullen Class/Type Priority QS . . .

the accounting statements made by J & H to Aneco on a periodic basis were headed as follows:

Ceding Company: NT Bullen Esq & Others Treaty: Marine Facultative Obligatory PPN TTY . . .

a letter dated 26 Jan, 1990 from J & H to Nordisk Triton Insurance Co Ltd which stated:

. . . Last year Aneco took the view that they would like to participate in Marine Excess of Loss Business by way of following established Lloyd's and London company underwriters on a Quota Share basis . . .

I have no hesitation in finding that Messrs King, Adams, Green, Winter, Mackenzie, Jenkins and Delanoue were induced by the said material misrepresentations to enter into the respective contracts and that J & H were negligent in making the said misrepresentations.

(2) Non-disclosure of some or all of the following material circumstances: (i) that the only treaty that Aneco had formed an intention to write (or had written) at the time of the presentations was (ii) a fac/oblig (iii) reinsurance of the Bullen syndicates and that (iv) the whole of the EPI was derived from

this (one) treaty.

Under this heading I address Aneco's principal allegations (2) and (3) above ((2) J & H did not disclose to any underwriter that the only treaty that Aneco had formed the intention to write at the time of the presentation was a fac/oblig reinsurance of Bullen; (3) J & H did not disclose to certain underwriters that the whole of the disclosed EPI was derived from the Bullen fac/oblig treaty).

I set out below my findings on a balance of probabilities as to non-disclosure and inducement under (i) to (iv) above. Before doing so I should record the following matters. First, the findings set out below reflect my assessment of the individual witnesses. Second, I have had regard to the document entitled "Summary of points taken by underwriters in the present proceedings" prepared on behalf of Aneco, as amended in argument. Where an underwriter does not appear under a particular item of non-disclosure on the summary (as amended) I have excluded that underwriter in respect of the relevant item. Third, the presentations differed. Two brokers were involved, Mr Forster and Mr Yardley. The contemporary records of Messrs King, Adams, Green and Mackenzie provide a guide as to what Mr Forster probably said where he broked the risk and the contemporary records of Mr Jenkins to what Mr Yardley probably said, or would have said if asked for further information, where he broked the risk. No underwriter was told that the underlying treaty was a fac/oblig. A few deduced or guessed this (including Mr Panter and Mr Cleverley). The probability is that Mr Yardley only volunteered (further limited) information beyond the written materials if he was asked. Fourth, after this passage of time it is not easy for the witnesses (or the Court). I suspect that after this passage of time some witnesses called by Aneco may have made concessions beyond those that in fact were appropriate. But I have to apply the appropriate standard of proof in the light of the evidence given.

As to material circumstance (ii) (a fac/oblig), I find that this material circumstance was not disclosed to the underwriters named below and that this non-disclosure induced each of these underwriters to enter into the respective contracts: King, Adams, Green, Patrick, Watkins, Winter, Clifford, Sawyer, Delahunty, Jay (Prudential), Davies, Hayward, Mackenzie (Copenhagen Re), Delanoue (Ancienne Mutuelle), Wills, Jenkins (Norwich Union/Maritime), Emms/836 and Moody. (Pexton and Panter were omitted from this category by the plaintiffs and I am not satisfied as to inducement in the case of Howell and Andrews).

As to material circumstances (i), (iii) and (iv) (that the only treaty that Aneco had formed an intention to write (or had written) at the time of the presentations was a . . . reinsurance of the Bullen syndicates and that the whole of the EPI was derived from this (one) treaty), I find that these material circumstances were not disclosed to the underwriters named below and that these non-disclosures induced each of these underwriters to enter into the respective contracts: Patrick, Watkins, Delahunty, Jay (Prudential), Pexton, Jenkins (Norwich Union/Maritime).

As to material circumstance (iv) (the whole of the EPI was derived from this (one) treaty), I find that this material circumstance was not disclosed to Mr Delanoue (Ancienne Mutuelle) and that this non-disclosure induced Mr Delanoue to enter into the relevant contracts.

(3) Non-disclosure to the following market that Mr King's subscription to the risk and his rating of it were obtained by misrepresentation/non-disclosure.

In The Zephyr, [1985] 2 Lloyd's Rep 529 at 539, Lord Justice Mustill said: --

Thus, if the Posgate syndicates are to make good even the first stage of their argument, they must show that there is some special feature of the London marine market which transforms an undertaking to the leader into one which can be sued upon by those who follow him on the slip. There appear to be only three possibilities. First, that the leading underwriter is an agent for the latter subscribers to receive the broker's promise, although for no other purpose. This proposition has only to be stated, to be discarded. Second, that there is an analogy with the supposed rule that a misrepresentation by the broker to the leading underwriter of such a character as to entitle the latter to avoid his contract with the assured, is effective to give a similar right to the other subscribers: see Arnould on Marine Insurance, 16th Edn par 623. I doubt whether this rule is still good law, if indeed it ever was. In any event, no analogy can be drawn. One can perhaps just accept that since the slip embodies all the individual contracts between underwriters and assured, a misrepresentation made to the leader upon whose judgment all other subscribers in some degree rely, might be regarded as infecting all the other

contracts. There is nothing of the sort here, for as the learned Judge has rightly held, the promise about signing down forms no part of the contract between 'the underwriter and the assured, and (in, contrast with the signing down which actually happens) has no effect upon it. The third argument is as follows. By this strange usage of Lloyd's, the writing of any subsequent line, beyond the point of over-subscription subtracts from the content of the earlier lines so that although the contracts represented by the different sets of initials are individual and not joint,, nevertheless they bare mutually dependent. Hence, anything which bears on the line ultimately taken by one underwriter, must equally bear on all the others. The first stage of this argument is correct, but the remainder is a non sequitur. The fact that the broker promises to one subscriber what he will try to do by way of collecting other subscriptions, is no ground for regarding the promise as inferentially repeated to those other subscribers.

In Bank Leumi Le Israel BM v British National Insurance Co Ltd, [1988] 1 Lloyd's Rep 71 at 76, ML Justice Saville said:

. . . The defendant insurers, sought to counter this argument by submitting that it is a rule of insurance law that following underwriters can take advantage of non-disclosures or misrepresentations established in the case of the leading underwriter; that such are in effect to be treated as applying to all the underwriters subscribing to an insurance. He cited par 623 of Arnould on the Law of Marine Insurance and Average, 16th ed (1981) to support this argument . . . the cases cited in Arnould in support of the supposed rule are all very old; they concern marine insurance and the 18th and early 19th century practices at Lloyd's. The supposed rule does not appear in the Marine Insurance Act, 1906 which, on these topics, was accepted by the parties to reflect the general law of insurance. Indeed, it can be said with some force that the provisions of this Act are inconsistent with any such rule . . . It can thus be argued that, whereas the Act only allows avoidance on proof that there was a failure to disclose or a misrepresentation of material facts to the insurer seeking avoidance, the supposed rule permits avoidance by insurers who have not established any such failure or misrepresentation in their own cases.

It is no doubt the position (at least in some insurance markets) that following underwriters often do subscribe simply or largely on the basis of trusting the skill and judgment of the leading underwriter and upon the assumption that the leading underwriter has subscribed only after considering full and accurate information about the risk. Thus it might be that, in any case where this is established, the supposed rule could perhaps be supported by proving a custom or usage in the particular market, or by importing an implied term into the contracts of the following underwriters, or even perhaps by treating the rule as resting upon some implied representation made to the following underwriters that all material circumstances have been accurately provided to the leading underwriter. Even then the supposed rule could cause difficulties: for example, would it apply when the following underwriters (but not the leading underwriter), have been given full and accurate details of the risk? It must always be remembered that each subscribing underwriter makes a separate contract for himself (or for those he represents) so that it is difficult to accept the proposition that the mere fact that the leading underwriter may be able to avoid his contract should allow the others, contracting separately with the assured, also to do so.

For the reasons given earlier in the judgment, it is not necessary for me to decide this point in this case. Suffice it to say that I share the doubts expressed by Lord Justice Mustill about the validity of this supposed rule (see The Zephyr). Had I been persuaded that there was material non-disclosure or misrepresentation to the underwriting agent of the first three defendants, so that those defendants were able to avoid their contract with the bank, I would have required a great deal of persuading that the remaining following underwriters were also, without more, entitled to the same relief. This risk was not written in the marine market or at Lloyd's; and whether or not the following underwriters did subscribe on the basis of assuming that the leading underwriter had been supplied with full and accurate information and that he had properly evaluated the risk are matters on which . . . I was given no evidence at all.

In the interim award the arbitrators held:

(a) The failure by Mr Yardley, or any other employee of J & H, to disclose to the following Underwriters (named Respondents 1-29) that Mr Forster had misrepresented to Mr King, as the leading Underwriter, that the Bullen treaty was a quota share, when in fact it was a fac/oblig, and that Mr King had rated the risk on that basis, and that in consequence the presentation of the risk to Mr King had

been unfair, were material circumstances which would influence the judgment of any prudent insurer in the position of the following Underwriters in determining whether or not to take the risk by subscribing to any of the slips. (b) These material circumstances were known to Aneco's brokers, who were J & H and not just Mr Forster or Mr Yard1ey or any of their individual employees. It is therefore irrelevant that it was probably unknown to Mr Yardley and any other employee who may have taken these slips round the following market that Mr Forster had obtained the cover from Mr King in consequence of a misrepresentation.

(c) None of the named Respondents 1-29 would have subscribed to any of Aneco's slips if the foregoing material circumstances had been disclosed to them. This failure had the effect of rendering unfair the presentation of the risk to them.

(d) It was submitted on behalf of Aneco that we could draw no conclusions in relation to those of the following Underwriters from whom we had no evidence. But we do not accept this, we are not bound by the rules of evidence; we are entitled to draw inferences; and we are also entitled to use our own knowledge and experience of the insurance market, and in this case of the practice at Lloyd's. The foregoing conclusions are in our view a matter of irresistible inference in relation to each of the following underwriters.

(e) We add, for the sake of completeness, that the following conclusions would equally apply to the named Respondents 3-29 inclusive if they had known that the same misrepresentation had been made to Mr Green and Mr Adams.

(f) It follows that the named Respondents 1-29 inclusive, as well as Mr King, are entitled to avoid these reinsurances. We refer to the Marine Insurance Act 1906, sections 17, 18 and 19 as well as to the authorities already cited above. We were also referred to The "Zeyphr" . . . and Bank Leumi v British National Insurance Co . . . however we do not consider these judgments have any bearing on our conclusions. We are not suggesting that the misrepresentations made to Mr King (and Messrs Green and Adams) are to be treated as having also been made to the following Underwriters. Furthermore, as suggested in Halsury's Laws, 5th ed, vol 25 paragraph 239, we regard our conclusions as being primarily conclusions of fact, not law.

(g) The foregoing conclusions could also be based on an implied representation by the brokers to each of the following Underwriters that the risk had been broked fairly to the leader(s) on the slips, which was untrue, but which induced the following Underwriters to subscribe to the risk. This way of putting the matter would be equally in accordance with the facts.

Aneco's submission is that the fact that J & H had misrepresented to Mr King (as the lead underwriter) that Aneco intended to write a quota share of Mr Bullen's account (and not a fac/oblig treaty) was a material circumstance which the brokers were required to disclose in order to make a fair presentation of the risk to each of the following underwriters and that this non-disclosure induced the making of the respective contracts. This submission differs from that advanced in Bank Leumi sup.

It is of course elementary that each subscribing underwriter makes a separate contract or contracts on behalf of his syndicate or company.

It is necessary to distinguish for present purposes between (i) the Lloyd's following market (ii) the members of the London Companies market who subscribed to the risk and (iii) the members of the overseas market who subscribed to the risk. I will consider the Lloyd's following market first.

There was considerable evidence as to the practices of the Lloyd's marine market in late 1988/early 1989. Any finding in this case is by reference to the evidence in this case (and not intended to lay down any general rule).

Mr Berry was asked --

Make the assumption that the risk was misbroked to Mr King who was the leader; is it material to the following market . . . to know the fact? Mr Berry replied:

I think it would certainly influence their judgment if they knew it had not been properly broked to the

leader . . . they would undoubtedly go and talk to the leader or send it back to the leader . . . you do very largely follow who the leading underwriter is, and you expect that the rate that he has put on the slip and the terms and conditions are based on a proper presentation.

Mr Berry made it clear that by "misbroked" he was talking about a material misrepresentation or non-disclosure which influenced the leader in his approach to the risk.

The evidence from the Lloyd's following market on this aspect of the case was consistent and compelling. I refer in particular to the evidence from the following: Messrs Adams, Green, Patrick, Watkins, Winter, Clifford, Sawyer, Delahunty, Davies, Pexton, Hayward, Howell, Andrews, Wills, Panter (who was called to give evidence by the defendants) and Emms. With the exception of Mr Emms whose evidence was admitted under the Civil Evidence Act, the evidence from each of these witnesses on this issue is referred to above.

I find that in particular circumstances of this case the fact that J & H misrepresented to Mr King (as lead underwriter) that Aneco intended to write a quota share of ML Bullen's account (and not a fac/oblig treaty) was a material circumstance which the brokers were required to disclose in order to make a fair presentation of the risk to each of the following Lloyd's underwriters listed above, and that this (negligent) non-disclosure induced the making of the contracts in each case.

I reach a similar conclusion in the case of Mr Moody and in the case of the further Lloyd's underwriters who did not give evidence: Messrs Cleverley, Nicholls, Collings, Beaumont, Banbury, Seaby and Highnam. Aneco are in my opinion entitled to rely on a presumption of inducement in the case of these underwriters (see St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd and Others, [1995] 2 Lloyd's Rep 116 at p 127, Lord Justice Evans and see further Marc Rich & Co v Portman, [1996] 1 Lloyd's Rep 430 at pp 441-442, Mr Justice Longmore).

There is no evidence to displace a presumption of inducement.

In view of my findings set out above on other issues it is not necessary to express any conclusion under this heading in respect of the Prudential, the Copenhagen Re, Norwich Union/Maritime and Ancienne Mutuelle. In particular it is not necessary in view of my findings set out above to decide whether there are differences in the present context between the Lloyd's following market and the London companies market and the overseas market.

It follows that J & H were in breach of the implied term in the contract between Aneco and J & H that J & H would act with reasonable care and skill in and about obtaining quotes for and placing the excess of loss reinsurance and that J & H were negligent, to the extent set out above.

The Bohling amendment

In reaching the conclusions set out above I have disregarded the Bohling amendment. Had it been necessary to consider this aspect of the case I would have held that Mr King's handwriting on 20 Jan, 1989 -- "3 (b) Reassured has accepted specific Aviation Treaty from one reassured -- EPI £10,000" accurately reflected what Mr King was told and that this was another example of inadequate broking by J & H.

Other fac/oblig protections written

The INA contract

J & H say that this is relevant in two ways. First, they say Mr Forster reminded Mr King about this contract when broking the Aneco XL programme. But I do not accept Mr Forster's evidence to this effect. Second, J & H say that the INA contract shows that those who subscribed to the XL protection of the INA contract were willing to write XL protections of fac/obligs, and justifies Mr Forster's belief that those who he approached to lead and write this risk had no objection to writing XL protections of fac/obligs. But there were a number of material distinctions between the INA treaty and the Bullen treaty.

The Mander contract

J & H rely upon the fact that several underwriters also wrote this contract, an excess of loss protection of a fac/oblig, and did so shortly before they wrote the Aneco contract.

I accept Mr King's evidence that Mr Mander's account was totally different from Mr Bullen's account and evidence to the same effect from other underwriters.

The protection of the CER participation in the Bullen contract

J & H also rely on the fact that Mr Watkins wrote an XL protection of the CER's participation in the Bullen SPT. I accept Mr Watkins' evidence as to this. He explained that this was because his syndicate did a great deal of business with the broker concerned.

The 1990 renewal

J & H say that the 1990 renewal is relevant to two issues, inducement and affirmation. I have paid careful attention to this aspect of the case in reaching my conclusions set out above as to inducement.

As to affirmation, I refer to the principles set out above. The election has generally to be an informed choice, made with knowledge of the facts giving rise to the right. On the 1990 renewal none of the underwriters had knowledge of the facts as to the Bullen treaty, giving rise to a right of avoidance for misrepresentation or non-disclosure.

Alleged affirmation by Copenhagen Re and Norwich Union

Again the relevant legal principles are set out above. The Copenhagen Re and the Norwich Union did not have knowledge of the facts giving rise to the right. On any view Mr Graham and Mr Staples were presented with a materially incomplete account of the central findings of the tribunal. In addition I refer to my findings set out above as to the conflict between the evidence of the witnesses from the Copenhagen Re and the Norwich Union the one hand, and Mr Oliver and Mr Knox of J & H on the other. As stated above I prefer the evidence of the former. In view of these findings it cannot be said that the Copenhagen Re and the Norwich Union acted in a way which was only consistent with an intention not to treat the contracts as at an end.

Contributory negligence

Mr Crawley's experience both as a broker and as an underwriter was largely in the non-marine market. He had limited knowledge of the London marine market. The first knowledge Mr Crawley had of the way the marine market in Lloyd's and the London companies marine market regarded fac/obligs was during the arbitration. J & H professed special expertise in the placing of this type of risk in the marine market. J & H did not indicate to Mr Crawley what would be said orally to underwriters about the one treaty that Aneco had in the pipeline. I refer to the contemporary correspondence between Aneco and J & H quoted above. In all the circumstances I do not consider that there was any contributory negligence on the part of Aneco.

Points which are no longer pursued

The following points are not pursued by J & H -- points of defence pars 17, 17A, 19(2), 19(4) and 20.

Damages

Aneco contend that as a result of J & H's breaches of contractual duty and negligence, they are entitled to recover one of two alternative measures of loss:

1. Aneco's primary case -- losses incurred by Aneco under the Bullen and Bohling treaties which were underwritten by Aneco in reliance upon the advice given to them by J & H that excess of loss reinsurance was available and had been placed on the terms advised; alternatively

2. Aneco's alternative case -- loss measured by reference to the extent to which Aneco are unable to recover under the excess of loss reinsurance.

As to the primary case and the alternative case the matters of quantum agreed and still in dispute are set out in a summary prepared by the parties -- Schedule 1 hereto.

Aneco's primary case

Aneco's submissions included the following. For Aneco to recover damages from J & H on the primary basis, it would be sufficient for Aneco to prove that the advice given as to available reinsurance was negligent. Further Aneco allege that J & H ought to have advised Aneco during the course of December, 1988, prior to Aneco's acceptance of the Bullen treaty, that there would not be sufficient support in the market to enable J & H to place the proposed reinsurance programme. Alternatively, if it was placeable at all, it would have been at a substantially higher price than that advised (namely 51 per cent of the Bullen EPI) with a consequence that Aneco would not have participated in the Bullen treaty. As to burden of proof, while Aneco must demonstrate that the advice given by J & H in relation to the availability of reinsurance based on the King quotations was negligent, the burden of proof thereafter transfers to J & H in relation to showing that if Mr King et al would not have written it, others would have at that price or a comparable price. If the Court does not accept that the burden of proof transfers to J & H, Aneco contend that the burden of establishing the unavailability of alternative security is amply satisfied on clear evidence. Aneco do not ask the Court to dispose of this important question solely on burden of proof. On the inwards business J & H were brokers for Bullen anxious to place with Aneco a number of units of the Bullen treaty and thereby earn brokerage for themselves. In placing the outwards protection of that risk (assuming that Aneco were to accept a participation on the inwards treaty) J & H were acting as brokers for Aneco. J & H's duties towards Aneco extended beyond the task of placing outwards protection for Aneco should Aneco choose to write the inwards business. Aneco made it clear to J & H that they were not prepared to take any participation in the Bullen contract or any other similar contracts unless J & H were to advise them that adequate and satisfactory excess of loss protection could be and would be obtained. J & H accepted the responsibility of advising Aneco as to the availability of appropriate excess of loss reinsurance and in due course reported not only that such reinsurance was obtainable at an affordable premium but that it had been largely obtained. J & H were not engaged to advise Aneco on all aspects of their contemplated decision to subscribe to the Bullen treaty. But, crucially, J & H were asked to advise on the availability of excess of loss protection and were aware that if the advice from J & H was that such protection was not available, or not available on the terms as to premium which made commercial sense, Aneco would not participate in the Bullen treaty. In the words of Mr Forster without reinsurance "the whole deal would have collapsed". In those circumstances the loss attributable to having written that treaty and the Bohling treaty is directly and fairly attributable to the negligent advice provided by J & H. To hold J & H responsible to Aneco for the consequences of their negligent advice is to give best effect to the responsibility assumed by them. The proper measure of damages requires the Court to compare the plaintiff's position as a result of entering into the Bullen and Bohling treaties with what it would have been if those treaties had not been subscribed by Aneco. Aneco entered into both treaties in reliance on the negligent advice provided by J & H. As a result Aneco is worse off to the extent of the losses arising under those two treaties.

It is common ground that it is important to distinguish between two different questions: (i) Have the plaintiffs suffered any loss in consequence of the defendants' wrong? (ii) If so, is the loss which they have suffered within the scope of the defendants' duty?

J & H's submissions included the following. J & H are liable for such loss as is attributable to the fact that that reinsurance which Aneco supposed to be and were told was in place, was not in the event there. Such loss does fall within the scope of the duty of J & H as reinsurance brokers. But J & H are not liable for that loss which Aneco would still have suffered had the reinsurance stood up. That loss is not within the scope of J & H's duty to Aneco as reinsurance placing brokers, inter alia because it does not have a sufficient causal connection with the subject matter of the duty. That loss (the uninsured loss) arises from the decision of Mr Crawley on behalf of Aneco (a) to enter the marine market; (b) to write the Bullen and Bohling treaties and (c) to do so with limited reinsurance which, in the event, would have proved insufficient, even if none of the underwriters had avoided. J & H never undertook to Aneco to safeguard them against all the risks inherent in writing the Bullen and Bohling treaties or the losses which Aneco would suffer, even if fully reinsured and even if what J & H said as to the position was true. Aneco could not reasonably have supposed (and did not suppose) that J & H assumed a responsibility to safeguard them against loss which Aneco would suffer even if the reinsurance was

valid and even if every word they said was true. J & H never assumed a responsibility to advise Aneco whether it should subscribe to the Bullen and Bohling treaties. In respect of those treaties J & H were acting for Bullen and Bohling and J & II owed a duty to those syndicates as their agents; conversely they owed no such duty to Aneco. Nor did J & H owe Aneco any duty to advise Aneco whether reinsurance, and if so how much, should be taken out, nor, even had they owed such duty, were they, or are they even said to have been, in breach of any such duty.

J & H say that the appropriate measure of loss is reflected in Aneco's alternative case -- the loss measured by reference to the extent to which Aneco are unable to recover under the excess of loss reinsurance.

It is convenient to consider first whether alternative security would (or would not) probably have been available at a broadly similar price if there had been a fair presentation of the risk.

The question whether alternative security would (or would not) probably have been available at a broadly similar price if there had been a fair presentation of the risk?

This is not an easy question. Despite a number of powerful points made on behalf of Aneco, having carefully considered all the evidence I find that alternative security would probably have been available at a broadly similar price if there had been a fair presentation of the risk. My analysis is as follows.

1. It is vitally important (however difficult it may be to do so) to put on December, 1988 spectacles when considering this question. It is important to have regard to the state of the relevant section of the market in December, 1988.

2. It is necessary to put aside what is now known with the benefit of hindsight for example that the following losses occurred: -- Hurricane Hugo, Exxon Valdez and Phillips Petroleum.

3. It is useful to refer to Mr Crawley's perception in 1988. He said that following Piper Alpha in July, 1988 a sharp rise in premium rates was anticipated, and this was one of the matters that led him to consider becoming involved in the marine market for 1989. He took the view that major losses in the marine market were pretty rare and that it was statistically unlikely that something similar to Piper Alpha would occur the very next year, 1989. He believed that the likelihood of another Piper Alpha in 1989, or for the next 10 years, was remote. It is necessary to focus on the perception of the relevant market in December, 1988.

4. I have held that the brokers failed to make a fair presentation of the risk. Understandably a number of witnesses who gave evidence have strong views about the way the risk was broked. It is (understandably) particularly difficult for such witnesses to provide balanced assistance to the Court on the subject of alternative security. Attitudes (understandably) have probably hardened in some cases.

5. Nor is this an easy question for the experts. There is a limit to the extent to which they can speak as to the likely attitude of other syndicates/ companies (whether in the London market or overseas) in December, 1988. The notes of the meeting between the underwriting experts contained the following revealing agreed comment in relation to whether similarly priced alternative security would have been available --

We see what each other is saying and neither can be certain regarding placement or otherwise.

6. As to potential sources of reinsurers, there were about 200-250 marine syndicates at Lloyd's in December, 1988 of which a "major percentage" wrote excess of loss including XL on XL. There were about 111 ILU companies and about 15 non-ILU companies. In addition there was the overseas market. As to the latter I refer by way of example to the evidence of Mr Wood who placed two treaties for NW Re (XL on XL and fac/oblig). Mr Wood placed the two treaties with 20 companies writing 5 per cent each and those 20 companies were in Norway, Holland, Finland, Sweden, Belgium, France and Germany. Mr Wood accepted that most of the relevant Lloyd's market (potential leaders and followers) appeared on the marketing sheets (along with some members of the London companies market) but it is necessary to consider all potential sources of reinsurers.

7. It is necessary to bear in mind how the market works in practice. Mr Wood explained that underwriters will say one thing to one broker and something else to another. He referred to the evidence about "oblige" lines and said that it is not so much "oblige" as trading:

It is quite possible for a broker with a big direct account . . . to go to an underwriter and say: "Look, we need some help on this. It is only a small XL programme. We put . . . millions of dollars of cream business into your company or syndicate and we would like a bit of help on this." That sort of thing goes on all the time . . . a broker can come to you and say, "Look I gave you £5 million of premium and we have a jolly good relationship. I need a bit of help on this risk. I know it is not what you normally like, but would you please lead this off?", and so on.

8. I accept the expert evidence to the effect that some syndicates and companies are prepared to lead when they are not prepared to follow, because a leader has a measure of control on terms etc.

9. Syndicates and companies will change their position on a second visit from a broker.

10. Syndicates and companies do not always adhere to their declared policy. Mr Wood said:

I . . . did not lead marine XL on XL -- or at least that was my declared policy. I expect if we look through the portfolio, we will probably find that I did lead the odd one or two.

11. When Mr Beer was asked:

[Q] The reality is that there is nobody that could have led this slip, is there? [-- he gave what I consider to be a telling answer --] I do not accept that. I do not think there is any way we can sit here and go back to that market at the time. I believe that a broker, or most brokers, would have been able to place most of the business they had.

12. J & H could have brought extra resources to bear on the marketing. The last thing that J & H would have done would have been to admit they could not have placed this risk. As Mr Beer said:

There were company markets, there were overseas markets and it depends on how much effort you put into the broking process . . . With due respect to Mr Forster, nine years ago he was (a) rather younger broker than he is now and less senior, and he may well have enlisted the help of his principals in placing this business who would have had contacts and power and persuasion of their own. To say that you cannot place this, I just do not accept that. This is real hindsight broking.

13. It is clear that Mr Bullen was particularly keen to obtain the fac/oblig facility. Equally Mr Crawley was particularly keen to enter this market for reasons recorded above (although subsequent events proved this judgment wrong). J & H were undoubtedly keen to earn the brokerage on the two transactions.

14. Mr Crawley's affidavit and the contemporary documents show that Mr Crawley was flexible in his approach (see for example pars 8, 11, 17 and 18 of his affidavit and the contemporary documents passing between Mr Crawley and Mr Forster).

15. It would have been possible to make some amendments or adjustments to the terms of the fac/oblig treaty having regard to the requirements of the (new) leader. (I accept that Mr King would not have led the risk).

16. A considerable amount of evidence was devoted to an attempted examination of whether alternative leaders might have been available. It is common ground that a number of candidates who were discussed would not have led the risk. I do not propose to review this evidence. The plaintiffs made inroads on the list put forward by the defendants. But the exercise was inevitably somewhat artificial. Suffice it to say that although it would undoubtedly have been difficult to find a leader following a fair presentation of the risk, I find that on a balance of probabilities a leader would have been found in that market at that time if approached about the time that Mr King was approached. I suspect that some amendments or adjustments would probably have been required by the new leader. Following such adjustments and amendments I consider that a leader would have been found at broadly similar rates acceptable to Mr Crawley. In my view Mr Crawley would probably have been

rather more flexible in his approach than he indicated when giving evidence. I do not consider that the broking to the following market would have been easy. J & H would have had to exert themselves and employ all available (proper) broking techniques and would probably have had to draw on the services of a more senior broker. But subject to the above I consider that J & H would probably have been able to complete the placement albeit with difficulty at a broadly similar rate but using a markedly different list of following underwriters, with much more extensive use of the London companies and overseas markets.

17. I emphasize that in reaching these conclusions I have sought to focus on the state of the market in December, 1988. Hurricane Hugo, Exxon Valdez and Phillips Petroleum were yet to come as were the judgments of this Court in Gooda Walker, Feltrim, Rose Thomson Young and Bromley.

Aneco's alternative case: the correct measure of damage

It follows from my findings of fact set out above that Aneco's alternative case represents the correct measure of damage.

I should however add my conclusions on the legal arguments that have been addressed: 1. When an agent has failed to effect or renew a valid insurance in accordance with his instructions, and is liable in damages to his principal as a result of the principles of law set out above, the measure of such damages in the event of a loss is the amount necessary to place the principal in the same position as if the insurance contract had been made or renewed as instructed. [MacGillivray and Parkington on Insurance Law, 8th ed, par 387].

2. The fundamental principle governing the measure of damages is that the plaintiff should be put, so far as money can do it, in the position he would have been occupied if the defendant had discharged his duty. In claims against insurance brokers, the main (and often the only) item of damages claimed is the amount which would have been payable by the insurers (or reinsurers) but for the broker's breach of duty. This loss is plainly recoverable, subject to a possible discount on the grounds discussed above. Jackson & Powell on Professional Negligence, 4th ed, par 7-81.

3. It is necessary to apply the principles set out in the decisions of the House of Lords in Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd, [1991] 2 AC 249; Banque Bruxelles SA Eagle Star Insurance Co plc, [1997] 1 AC 191 and Smith New Court Securities Ltd v Scrimgeour Vickers, [1996] 3 WLR 1051.

In Banque Bruxelles Lord Hoffmann said (p 211A):

. . . Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action . . . (p 213C). Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In tile case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate . . .

Lord Hoffmann then illustrated the difference between the ordinary principle and that adopted by the Court of Appeal by the example of the mountaineer's knee.

He continued at p 214D:

. . . A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them. The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care

to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having being taken. If this duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong . . . (at p 217G). The calculation of loss must of course involve comparing what the plaintiff has lost as a result of making the loan with what his position would have been if he had not made it. If for example the lender would have lost the same money on some other transaction, then the valuer's negligence has caused him no loss. Likewise if he has substantially over-valued the property so that the lender stands to make a loss if he has to sell the security at current values, but a rise in the property market enables him to realise enough to pay off the whole loan, the lender has suffered no loss but the question of whether the lender has suffered a loss is not the same as the question of how one defines the kind of loss which falls within the scope of the duty of care . . . A plaintiff has to prove that he has suffered loss and that the loss fell within the scope of the duty. The fact that he cannot recover for loss which he has not suffered does not entitle him to an award of damages for loss which he has suffered but which does not fall within the scope of the valuer's duty of care.

4. For what kind of loss is Aneco entitled to compensation? What consequences are attributable to that which made the act wrongful? There is no allegation of fraud in the present case. The nature of J & H's engagement is reflected in the contemporary documents quoted above. J & H did not assume a duty to advise Aneco as to whether to enter the marine market in 1989 and in particular as to whether to subscribe to three units of the Bullen treaty. J & H are responsible for Aneco's losses measured by reference to the extent to which Aneco are unable to recover under the excess of loss reinsurance (ie Aneco's alternative case). But Aneco suffered consequences well beyond this measure of loss. Although Mr Crawley took the view that it was statistically unlikely that something similar to Piper Alpha would occur in 1989, subsequent events proved this underwriting judgment wrong. Aneco suffered extremely heavy losses because of Hurricane Hugo, Exxon Valdez and Phillips Petroleum. These additional consequences were not attributable to any wrongful act on the part of J & H. J & H are not responsible for these additional consequences.

Further matters as to quantum

I am not asked at this trial finally to assess damages against J & H with respect to the following companies:

(i) East West

(ii) Chandos

(iii) Sirius

(iv) Stockholm Re

(v) Trinity*

(vi) Fortress Re/Chiyoda/Taisei/Fuji/Nissan

(vii) Laurentian General

(viii) RMCA*

(ix) ICS*

(x) Kemper

(xi) CER

Those companies marked * are in liquidation or a scheme of arrangement or a composition with creditors.

There are three matters of principle still in dispute on Aneco's alternative claim for damages. It is agreed that the second and third matters should be adjourned for further argument, if necessary.

As to the first, the question posed is --

. . . whether on Aneco's alternative claim for damages, Aneco can claim for the sums repayable by Aneco but for its insolvency as a consequence of the Lloyd's syndicates and/or companies establishing their right to avoid their participation in the excess of loss reinsurances?

J & H's argument on this point is as follows. In the ordinary way, if Aneco were solvent, it would repay such net sums as have actually been paid to it by Lloyd's and those companies which are entitled to avoid and have taken steps to do so; J & H would be liable to pay Aneco the full amount of the net sums which would have been recoverable, since in effect Aneco, having repaid whatever it has been paid, would have recovered nothing. But Aneco is insolvent. As a matter of fact it is unlikely, if those reinsurers' claims for repayment rank as claims in the insolvency, that Aneco will be able to repay in full such net sums as have actually been paid to it by Lloyd's and those companies which are entitled to avoid and have taken steps to do so. The parties are agreed that in so far as any company establishes its right to avoid its participation in the excess of loss reinsurances and has paid losses under those reinsurances after the date of Aneco's insolvency in 1991, those companies will be repaid in full such post-liquidation payments. To this extent therefore the normal course of events will in fact occur and no difficulty arises. But in so far as net sums were paid by such companies before Aneco's liquidation, Aneco says that claims for their recovery rank as claims in liquidation which will be entitled to a dividend in the usual way. If they are not and such claims paid prior to the liquidation are recoverable in full as money paid under a mistake of fact, then no problem will arise. But if Aneco are right, then the companies in question will only recover a dividend rather than a full repayment of claims paid by them. This leaves J & H potentially exposed to a claim which has been threatened by Axa Re (formerly Ancienne Mutuelle). J & H deny liability to Axa Re (and any other companies who advance similar claims) but the point highlights a potential double jeopardy.

In J & H's submission either (i) J & H are only liable to Aneco in respect of net sums which it has been paid and is obliged to repay to the extent that it actually makes repayment of the same; or (ii) That part of the damages payable by J & H which represents the net sums paid to Aneco by its reinsurers, but which must be repaid by Aneco, should be impressed with a trust of the Quistclose type (see [1970] AC 567 at p 580C-D and F-G) and therefore paid in full to Lloyd's and those companies which are entitled to avoid their participation in the excess of loss reinsurance and have done so, rather than forming part of Aneco's general assets.

As to these submissions I cannot see any basis for limiting what would otherwise be J & H's liability in accordance with (i) above. Nor do I consider that there is any basis for directing that the net sums paid to Aneco by its reinsurers, but which must be repaid by Aneco, should be impressed with a Quistclose type trust.

Schedule 1

ANECO v J & H SUMMARY OF MATTERS OF QUANTUM AGREED AND STILL IN DISPUTE

1. Matters Agreed

1. The Court is not asked at this trial finally to assess damages against the Defendant under either measure of loss contended for by the Plaintiff, with respect to the following companies:

(i) East West

(ii) Chandos

(iii) Sirius

(iv) Stockholm Re

(v) Trinity*

(vi) Fortress Re/Chiyoda/Taisei/Fuji/Nissan

(vii) Laurentian General

(viii) RMCA*

(ix) ICS*

(x) Kemper

(xi) CER

Those companies marked * are in liquidation or a scheme of arrangement or a composition with creditors.

2. With respect to the Plaintiff's primary claim for damages, at this trial damages ought to be assessed on the basis that the companies listed above have not avoided their respective participation in the contracts of excess of loss reinsurance to which they subscribed, and that the net sum owed by those companies are in principle recoverable from them, save that, as a matter of principle, the Plaintiff does not accept thatcredit should be given for the net sums receivable from those companies marked with a * and Charter Re since they are not fully recoverable. The Defendant disputes this principle and this matter needs to be argued. Therefore the Plaintiff under its primary case agrees that the Defendant is entitled to credit

(i) for the net sums received to date from all the companies listed in paragraph 1 above and from those companies which have affirmed their respective participation in the excess of loss contracts to which they subscribed (Namely: Charter Re; Ridgewell Fox (including Allstate, AGF, GAN), River Thames, Terra Nova, Highlands and Cigna Re), and

(ii) for the net sums receivable from those companies listed in paragraph 1 above without * and from those companies which have affirmed their respective participation in the excess of loss contracts to which they subscribed (as identified in footnote 1) save for Charter Re which is in provisional liquidation.

The Defendant contends that at this stage there should be a credit in full for the net sums receivable from those companies marked with * and Charter Re.

3. The said "net sums received" and "net sums receivable" by the Plaintiff consist of claims paid and claims payable less deduction of minimum and deposit premiums, adjustment premium and reinstatement premium, all as set out in the schedule attached hereto. The net sums receivable include claims due from reinsurers who have not paid the full sum due for whatever reason (other than avoidance of the contracts) including delay. However if and to the extent that non payment occurs solely by reason of the inability to pay (whether due to insolvency, or being subject to a scheme of arrangement or a composition with creditors), or any other reason, the Plaintiff contends that credit should only be given for such net sums actually received.

4. (1) If the Plaintiff's contention in relation to the correct measure of credit is accepted, then the net sums received and receivable are $3,753,396 (This calculation is upon the basis that Trinity have paid to Aneco (both via J & H and direct by way of dividend) $89,991 as per p 2 of Cameron McKenna's letter dated 11 July 1997. J & H are unable at present to confirm that this figure is correct. The Court is invited to proceed on the basis of the figure as it stands. If the parties mutually agree that Trinity have in fact paid some other amount, the calculation will be adjusted accordingly and the Court will be informed).

(2) If the Defendant's contention in relation to the correct measure of credit at this stage is accepted then the net sums received and receivable are $4,636,724.

5. To the extent that the Plaintiff becomes entitled to receive any further net sums under the excess of loss reinsurances from (i) those companies listed in paragraph I above and/or (ii) those companies

which have affirmed their respective participation in the excess of loss contracts to which they subscribed, the Plaintiff will give the Defendant a credit for those sums against the damages in respect of further losses referred to in paragraph 9 below.

6. If and to the extent that, at a future date, any or all of the companies listed in paragraph 1 above successfully avoid their respective participation on the contracts of excess of loss reinsurance to which they subscribed, the Plaintiff will be at liberty to seek to recover in this action such further damages from the Defendant as it is thereby entitled to recover. The Defendant will be entitled to defend such an application only on grounds which the Defendant is not estopped from relying upon by reason of the judgment given.

7. The liability of Aneco under the Bullen and Bohling treaties as at 30 June 1996 was:

Bullen:
US$28,968,159

£2,790,080

Bohling:
US$1,466,928

£260,395

Against which the Plaintiff gives the Defendant credit for:

Can $11,587

and
Can $885

and the amount identified in paragraph 4 above.

8. The liability of Aneco under the Bullen treaty up to the end of the first quarter 1997 and under the Bohling treaty up to the end of the fourth quarter 1996 was:

Bullen:
US$30.076.174
less $18,551=$30,057,623

It is common ground that these amounts fall

to be deducted; however the parties are not

yet agreed whether they already have been

deducted in the figures on the left hand

side of the page so that this further

deduction represents a double deduction.

This must be capable of a definitive answer

and the parties hope to be able to give

the Court a definitive answer

on Thursday).

£2,866,224
less £1,231=£2,864,993

Bohling
US$1,482,777

£260,982

Against which the Plaintiff gives the Defendant credit for:

Can $10,936 (Bullen)

and
Can $885 (Bohling)

and the amount identified in paragraph 4 above.

9. It is agreed that under the Plaintiff's primary case the Plaintiff will be entitled to damages in the same amount as such further amounts (net of premium) as it becomes liable to pay under the Bullen and Bohling contracts in respect of future claims made under those contracts, subject however to giving the Defendant credit as set out in paragraph 5 above.

10. The Plaintiff and Defendant agree the figures set out in the attached schedule. However the Defendant says that East West has affirmed, but in accordance with paragraph I above the court is not asked to decide this issue.

11. (1) The Plaintiff and Defendant also agree that the net sums paid to date by (i) Lloyd's and (ii) each of the companies who have claimed to avoid the excess of loss reinsurance is

Lloyd's: US$1,538,017

(ii) Copenhagen Re (and those for whom it underwrote): US$861,748

Prudential and Pearl: US$307,840

Norwich Union/Maritime: US$35,185

Axa Re: US$1,254,545

(2) The Plaintiff (and Defendant) also agree that insofar as any company establishes its right to avoid its participation in the excess of loss reinsurances and has paid losses under those reinsurances post the date of the Plaintiff's insolvency in 1991, those companies will be repaid in full such post-liquidation payments. If it becomes necessary to ascertain those amounts, the parties will endeavour to agree them.

12. Depending upon the Court's findings as to which, if any, companies or syndicates are entitled to avoid and have avoided or claimed to avoid their participation in the excess of loss contracts to which they subscribed by reason of the Defendant's breach of duty:

(1) the court can use the Schedule attached hereto in order to determine the net sums which would have been payable by such companies or syndicates but for their being entitled to avoid or having successfully avoided;

(2) the court can use the figures in paragraph 11 above if and to the extent that the correct measure of damages requires the court to determine

(i) how much of the net sums which would have been payable by such companies or syndicates (but

for their being entitled to avoid or having successfully avoided) have in fact been paid by such companies or syndicates and

(ii) how much of the net sums which have in fact been paid by such companies or syndicates will in fact be repaid to them in full by the Plaintiff.

13. It is agreed that under the Plaintiff's alternative case, if the Plaintiff would, but for the avoided participation, become entitled to make further claims under the excess of loss reinsurance the Plaintiff will be entitled to seek such further damages as the court may award the Plaintiff in respect of such amounts as would have been receivable and recoverable from time to time under the avoided participation in the Excess of Loss reinsurance, but which is not recoverable due to the avoidance and where such avoidance is the result of the Defendant's negligence as established in this action.

14. With respect to the Plaintiff's claim for the recovery of the costs incurred in the Lloyd's and companies arbitrations, the Plaintiff and the Defendant agree the following figures:

(1) Lloyd's arbitration:

Subject to the caveat in (iii) below the Plaintiff has incurred a total amount of costs of £1,061,475. Of the total figure:

(i) Aneco's liability for Lloyd's costs: £357,000;

(ii) Aneco's liability for the Tribunal's fees: £95,895;

(iii) the remainder of £608,580 represents legal fees and disbursements billed by Cameron Markby Hewitt to the Plaintiffs and said by the Plaintiff to have incurred by the Plaintiffs in relation to the arbitration.

(2) Companies market arbitrations: damages to be assessed.

2. Matters of principle still in dispute

2.1 Whether, under the Plaintiff's primary claim for damages, the Defendant gets credit in respect of monies receivable from excess of loss reinsurers but unpaid solely as a consequence of the company's insolvency/ scheme of arrangement. The companies are those marked * and Charter Re. The Defendant admits that to the extent that claims are ultimately paid only in part by such companies by reason of their inability to pay due to insolvency or scheme of arrangement/ composition with creditors, then provided that the Plaintiff has exercised reasonable diligence to obtain such dividend as ought reasonably to have been obtained, the Defendant is not entitled to credit for the shortfall between the net sum payable and the dividend which is in fact paid. The Defendant contends that at this stage there should be a credit in full for the net sums receivable from those companies marked with * and Charter Re, subject to adjustment as aforesaid when the final dividend paid by such companies is known.

2.2 Whether under the Plaintiff's primary claim for damages, the Defendant gets credit in respect of net sums paid prior to the Plaintiff's insolvency by the syndicates and/or companies who claim to be and are entitled to avoid their participation in the excess of loss reinsurances and where they claim repayment of such sums in the Plaintiff's insolvency, to the extent that such sums are not in fact repaid by reason of the Plaintiff's insolvency.

2.3 Whether on the Plaintiff's alternative claim for damages, the Plaintiff can claim for sums repayable by Aneco but for its insolvency as a consequence of the Lloyd's syndicates and/ or companies establishing their right to avoid their participation in the excess of loss reinsurances.

2.4 Whether the insolvency of any company market participant in the excess of loss reinsurances occurring after they purport to avoid the reinsurances breaks the chain of causation and whether the fact of such insolvency precludes the Plaintiff from claiming the full amount of the sums due from that company.

2.5 Whether Cameron McKenna's fees and disbursements of £608,580 are payable as damages in full or whether the Defendant is only liable to the extent that such fees and disbursements are or would be recoverable by Cameron McKenna upon taxation on the standard basis.

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