THE SOCIETY OF LLOYD'S, Applicant (Respondent in Appeal) v. GERHARD EMIL MEINZER, also known as G.E. MEINZER, Respondent (Appellant in Appeal)
AND
THE SOCIETY OF LLOYD'S, Applicant (Respondent in Appeal) v. PAUL F. SAUNDERS, also known as P.F. SAUNDERS, Respondent (Appellant in Appeal)
AND
THE SOCIETY OF LLOYD'S, Applicant (Respondent in Appeal) v. ALLAN MILTON PAUL SMART, also known as A.M.P. SMART, Respondent (Appellant in Appeal)
AND
THE SOCIETY OF LLOYD'S, Applicant (Respondent in Appeal) v. DONALD ELMER STRINGER, also known As D.E. STRINGER, Respondent (Appellant in Appeal)

Docket Nos.: C34005, C34006, C34007, C34008

COURT OF APPEAL FOR ONTARIO

2001 Ont. C. A. LEXIS 481

September 11, 2000, Heard
August 29, 2001, Released

PRIOR HISTORY: [*1] On appeal from the judgment of Justice Katherine Swinton dated March 7, 2000.

COUNSEL: Alan Lenczner Q.C., Sheila Block and Glenn Smith, for the appellants.

Harvey Chaiton, Mark Hartman and George Benchetrit, for the respondent.

JUDGES: K. FELDMAN J.A. JOHN LASKIN AND S.T. GOUDGE JJ.A., CONCURRING.

OPINION BY: K. FELDMAN

OPINION:

FELDMAN J.A.:

This case represents the second Ontario installment of the story of a worldwide investment disaster. It is the final chapter of the quest by The Society of Lloyd's to enforce judgments granted in England against certain Ontario investors who became members of Lloyd's in the 1980's ("Names") without fully appreciating the potential magnitude of the risks associated with becoming a Lloyd's Name. The legal history of the appellants' fight to avoid liability to Lloyd's mirrors similar battles waged around the world by other domestic and international Names. n1

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n1 Names have brought proceedings against Lloyd's in the United Kingdom, the United States, Canada, Australia, Belgium and before the European Commission: The Society of Lloyd's v. Jaffray, [2000] E.W.J. No. 5731 (Q.B.D.)

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The judgment appealed from granted Lloyd's registration for enforcement in Ontario of judgments obtained in the United Kingdom against certain Canadian Names. Lloyd's commenced five "test case" applications involving five Names, but it was agreed that all 88 respondent Names would be bound by the result. Since the judgment, but before the appeal was argued, several of the affected Names entered into settlements with Lloyd's, while a number of others commenced proceedings under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-

3, thus staying these proceedings against them. The appeal proceeded on behalf of the remaining appellants within the "test case" context.

The Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O. 1990, c. R-6, defines an Ontario court's jurisdiction to grant or deny registration. The Act incorporates the Convention Between Canada and the United Kingdom for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, which is in force as a Schedule to the Act. Article IV of the Convention provides inter alia that:

1. Registration of a judgment shall be refused or set aside if

(a) the judgment has been satisfied; [*3]
. . . .

(e) enforcement of the judgment would be contrary to public policy in the territory of the registering court;
. . . .

3. If at the date of the application for registration the judgment of the original court has been partly satisfied, the judgment shall be registered only in respect of the balance remaining payable at that date. Rule 73 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, provides an application procedure to register and enforce a judgment in accordance with the Act. Relying on Article IV(1)(e), the appellants submitted to Swinton J. that enforcement of the judgments would be contrary to the public policy of Ontario on two bases: (1) There was a denial of natural justice because the appellants were denied the opportunity to litigate their allegations of fraud against Lloyd's; and, (2) Because Lloyd's contravened the Ontario Securities Act, R.S.O. 1990, c. S-5, by trading in securities without filing a prospectus, it would be against the public policy of Ontario to enforce judgments at the behest of Lloyd's based on agreements entered into in breach of the Securities Act. Relying on Article IV(1)(a) and Article IV(3), the appellants [*4] also submitted that certain of the judgments had been effectively satisfied in whole or in part.

In order to expedite an efficient and effective process without the need for extensive cross-examination on the affidavits filed, the parties and the application judge agreed to proceed by determining the natural justice and public policy issues on the basis that the appellants could prove the underlying facts upon which they relied. The two issues were agreed as follows:

(1) Assuming that the appellants' allegations of fraud are proven, would these allegations provide a defence to registration of the U.K. judgments on the ground that enforcement would be contrary to natural justice or public policy; and,

(2) Assuming that Lloyd's was required to deliver a prospectus pursuant to the Ontario Securities Act and failed to do so, would registration of the U.K. judgments be contrary to public policy?

If the determination was that taking the appellants' position at its highest, enforcement of the judgments in Ontario would not be contrary to natural justice or public policy, then the applications would be allowed, subject to the issue of whether certain judgments had [*5] been satisfied in whole or in part. The adopted procedure was not challenged on appeal.

The application judge answered both questions in favour of Lloyd's and also ruled that the judgments had not been satisfied within the meaning of the statute. Consequently, an order was issued for the registration and enforcement of the judgments.

The appellants challenge her decision on the following three grounds:

(1) The application judge applied the wrong test on the application, thereby holding the appellants to a more onerous burden of proof;

(2) The application judge erred in failing to find that there was a denial of natural justice in the procedure employed by the U.K. courts; and,

(3) The application judge erred in failing to find that it would be contrary to public policy for the judgments to be registered and enforced in Ontario, given the contravention of the Ontario Securities Act.

FACTS

The factual background of the Lloyd's saga has been repeated in numerous judgments in England, the United States, Canada and other jurisdictions which have dealt with the various aspects of the Lloyd's litigation. Swinton J. clearly and comprehensively set out in [*6] her Reasons the factual background of the structure of Lloyd's and the history of the appellants' legal struggle with it. As the factual background is not in dispute, I adopt her recital of the facts and background as set out at paras. 8 – 28 of her decision:

The Factual Background

Lloyd's does not carry on an insurance business. Instead, the function of Lloyd's is to regulate and provide services to the Lloyd's insurance market. Underwriting is carried out by "Names" – individuals who underwrite insurance through Lloyd's syndicates. All of the respondents here have been Names.

Affidavits filed by the respondents indicate the way in which some of the Names were recruited by Lloyd's. For example, Jacqueline Levin indicates that she was recruited by Lloyd's agents in Ontario. She stated that an application for membership must be made through a Members' Agent, authorized by Lloyd's to recruit members. She also had to attend a Rota Committee interview in London, England, where she was questioned about becoming a member of Lloyd's by a member of the Council of Lloyd's, the Society's governing body. After being accepted, she then signed the necessary documents in England, [*7] and she was given copies. The affidavit of Paul F. Saunders outlines in more detail the written information he received prior to becoming a member.

To be accepted for membership, the Names were required to enter into a series of agreements with the Members' Agent and Lloyd's itself, including the General Undertaking, the Agency Agreement and the Lloyd's Underwriting Members' Security Agreement. The General Undertaking bound the Names to comply with directions imposed by Lloyd's Council. Like the other documents signed, it mandated that disputes with Lloyd's must be heard in the English Courts and be governed by the laws of England. For example, Clause 2.1 reads:

The rights and obligations of the parties arising out of or relating to the member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the Laws of England. Each Name must lodge a deposit with Lloyd's equal to a certain percentage of the premium income, normally in
the form of a letter of credit. As well, Names must appoint a registered Members' Agent to act on their behalf, to whom they [*8] delegate the complete control of their affairs at Lloyd's.

The Names group together in syndicates, which are managed by a Managing Agent, whose name is often associated with the syndicate. A syndicate is not a legal entity nor a partnership; rather, it is simply a group of Names who join a particular syndicate for a particular underwriting year. Each policy of insurance issued at Lloyd's consists of individual contracts made on behalf of the individual Names participating in the syndicate. Each Name is only liable for his share of the risk, but not for the share of any other Name. However, the Name has unlimited liability to the extent of all his assets in respect of his insurance obligations at Lloyd's.

All premiums received for insurance policies are credited to a Premiums Trust Fund, which is governed by a Premiums Trust Deed. Its prime purpose is for the protection of policy holders. Each member is also required to make annual mandatory contributions to the Central Fund, which exists primarily to protect policy holders. It is used if claims cannot be satisfied through the Names' Lloyd's funds and personal assets.

The respondents allege that Lloyd's acted fraudulently in concealing [*9] the magnitude of risks associated with asbestos exposure claims arising in the United
States from about mid-1980. Normally, the accounts of a syndicate are left open for three years in order to defer the distribution of the profit until the pattern of claims' settlement for the syndicate year in question can be determined with reasonable certainty. Reinsurance to close is obtained, usually by paying a premium to the following underwriting year of the same syndicate. This premium is intended to cover the total outstanding claims, including those not yet reported in respect of risks signed in the year of account and those still outstanding from all previous years.
However, if the closing reserve cannot be calculated with sufficient certainty, and there are insufficient funds to purchase reinsurance to close, the syndicate is left open.

The respondents allege that despite the impossibility of determining the liability in respect of asbestosis, virtually every syndicate closed its 1979 year of account at December 31, 1981, taking reserves over a series of years in

an attempt to spread the losses over the Names who underwrote the syndicates throughout the 1980's. Apparently during the [*10] 1980's, Lloyd's recruited a considerable number of new Names. The respondents state that they were generally recruited in 1986 and after, becoming Names in 1987 and subsequent years, although the affidavit of Eric Mellish Lane indicates that he became a Name in 1979. They believe that Lloyd's misrepresented to them the risks to which they were exposed from asbestos and other long tail risks. Specifically, Lloyd's knowledge of future enormous and unquantifiable losses and its failure to disclose this information are alleged to be fraudulent conduct. So, too, was the publication of Lloyd's Global Accounts, which are alleged to have contained misleading information about the financial health of the syndicates.

By 1991 or 1992, the insurance market was in crisis. Lloyd's made cash calls on the Names and threatened to draw upon their letters of credit. In 1991, a group of Canadian Names issued a Statement of Claim in Ontario against Lloyd's and a number of banks, seeking an injunction to prevent the banks from paying out on the letters of credit, and preventing Lloyd's from trying to draw down on the letters of credit. They argue that their contracts with Lloyd's were void ab initio [*11] as having been induced by fraud and made in contravention of the Securities Act. Lloyd's brought a motion to stay the action on the basis of forum non conveniens, and was successful. McKeown J. determined that the proper forum for the determination of the issues was the United Kingdom because of the choice of law clause in Lloyd's General Undertaking. In addition, he determined that the English courts should take jurisdiction because the proceeding had a more substantial connection to England (Ash v. Lloyd's Corp. (1991), 6 O.R. (3d) 235 (Gen. Div.) at 248). That decision was upheld by the Court of Appeal ((1992), 9 O.R. (3d) 755 (C.A.); leave to appeal refused by the Supreme Court of Canada, [1992] S.C.C.A. No. 357, October 8, 1992). Writing for the Court of Appeal, Carthy J.A. stated at 758:

With a starting point of treating Lloyd's as the engine of the defence and treating the claims against it as the prominent concern in selecting a forum, I endorse the entirety of McKeown J.'s reasons for staying the action against Lloyd's. Even without the exclusive jurisdiction clauses, the contracts are to be performed in England, the alleged [*12] wrongful conduct was on the part of a large number of English residents who carry out the day-to-day functions under Lloyd's jurisdiction, and the overall picture is of an overwhelming affinity to England. Lloyd's drew down the Names' letters of credit, but also made cash calls. When the respondents did not pay the cash calls, Lloyd's paid the losses from the Central Fund, and in 1992 brought an action in the High Court of Justice of the United Kingdom against many of the respondents for reimbursement of the amounts paid. One of the defendants, Dr. Gian Carlo Mason from Hamilton, Ontario, filed a defence and counterclaim denying that there was money owing to Lloyd's because of the fraudulent conduct and misrepresentations by Lloyd's related to asbestos losses. This action has never proceeded to trial as a result of an order of the Commercial Court of the High ourt of Justice that Lloyd's was not required to proceed with the Mason case and could leave it in abeyance while it pursued the Clementson case, which raised defences relating to European Community law. To date, none of the Central Fund Writs cases has proceeded.

After 1993, a number of cases brought by action groups [*13] of Names against Managing Agents for negligence went to trial or settled. When the Names succeeded, damages were awarded to them. Some of the respondents here were successful in these actions. In subsequent litigation, the House of Lords determined that the litigation recoveries of the Names related to negligent underwriting are part of the Premiums Trust Funds. Similarly, litigation recoveries related to negligent advice in portfolio selection are part of the Premiums Trust Funds to the extent provided in the Premiums Trust Deeds. Lloyd's is the Regulating Trustee of Names' Premiums Trust Funds. In its capacity as Trustee, Lloyd's is entitled to those litigation recoveries and must deal with them in accordance with the Premiums Trust Deeds (The Society of Lloyd's v. Robinson, [1999] H.L.J. No. 17, House of Lords, reasons delivered March 25, 1999). Those funds are currently held by various solicitors for the action groups in escrow accounts, and there is ongoing dispute about their release.

Because of the chaos in the insurance market and in order to keep Lloyd's viable, Lloyd's sought a way to settle all the litigation in the market and the outstanding claims. In July, 1996, [*14] as part of its Reconstruction and Renewal Plan ("R & R Plan"), Lloyd's made an offer to Names worldwide to settle claims in respect to their 1992 and prior underwriting years. In order to effect the R & R Plan, a contract of reinsurance was entered into with a group of companies known as "Equitas". The Equitas reinsurance contract covered the entire non-life insurance market for the 1992 and prior underwriting years. Those Names who accepted the offer waived all claims against Lloyd's, Equitas, agents and auditors in respect of 1992 and prior years.

While the offer was accepted by a vast majority of Names worldwide, the respondents did not do so. Nevertheless, those Names who did not accept the R & R Settlement Offer still had their liabilities mandatorily reinsured by Equitas. Lloyd's compelled them to contract with Equitas by imposing upon them a replacement managing agent called "AUA9", which Lloyd's then directed to execute the reinsurance contracts on behalf of the Names. Lloyd's paid all Equitas premiums owing, and the rights to collect the Equitas premiums

were then assigned to it. Clause 5.5 of the reinsurance contract provided that each Name was obliged to pay his premium [*15] free and clear from any set-off, counterclaim or other deduction, including in respect of claims against Lloyd's. It also provided for a waiver by the Name to any claim to a stay of execution on the judgment.

The English Court Proceedings

Lloyd's then commenced actions to recover the Equitas premiums from those Names who did not accept the R & R offer, including the respondents here. Various Names raised numerous defences, arguing that they were not bound because of their non-acceptance of the R & R settlement offer; that Lloyd's had exceeded its power to amend or enact by-laws in creating the R & R scheme; that the assignment to Equitas from Lloyd's was improper; that the fraud by Lloyd's gave rise to a right to rescind the Names' contract with Lloyd's; that fraud by Lloyd's should give rise to a set-off of the fraud claims against the premium claims; that a stay of execution should be granted until the determination of the fraud claims; and that Lloyd's had breached Canadian securities legislation. Issues of quantum were also raised.

In a series of test cases managed through the Commercial Court, Lloyd's moved under R.S.C. Orders 14 and 14A, which bear some similarity [*16] to Ontario's Rules 20 and 21 dealing with summary judgment and determination of a preliminary point of law. Under O. 14, r. 3, the English Court must ask whether there is "an issue or question in dispute which ought to be tried."

In a series of judgments, Justices Colman and Tuckey of the Commercial Court wrote lengthy reasons in which they stated that the defences raised were without merit. Their decisions were upheld by the Court of Appeal. A brief summary follows.

In The Society of Lloyd's v. Leighs (February 20, 1997), Colman J. rejected defences based on the fact that the Names had not accepted the R & R plan and therefore, could not be bound by it, and that Lloyd's had no title to sue in respect of moneys payable under the R & R plan. Canadian Names were intervenors i this proceeding. In a subsequent decision released on April 23, 1997, The Society of Lloyd's v. Wilkinson, he determined that even if Lloyd's had engaged in fraudulent conduct, the law of rescission would not apply in the circumstances because of the impossibility of restitutio in integrum. He also held that Clause 5.5 of the Equitas contract prevented the defendants from setting off their counterclaim [*17] for damages for fraud against Lloyd's claim for the Equitas premium, and that there should be no stay of execution against them with respect to the judgment for the Equitas premium.

The judgments of Colman J. were upheld by the Court of Appeal in The Society of Lloyd's v. Leighs, Lyon and Wilkinson [1997] N.L.O.R. No. 721 (reasons dated July 31, 1997), and leave to appeal to the House of Lords was refused. Counsel appeared for 215 Canadian Names, who were granted intervenor status. The Court upheld the conclusions of Colman J. that the R & R By-law fell within the Society's powers, and the directions given to implement it were validly given; that the Names had not validly rescinded their General Undertakings and thereby avoided their contracts with Equitas concluded on their behalf by AUA9; that the Names were bound by the "no set off" provision in Clause 5.5 of the Equitas contract, given their agreement, at the time that they became Names, to be bound by the legislative and regulatory regime of the Society; and that clause prevented the non-accepting Names from raising claims of fraud against the Society in answer to a claim by the Society as assignee for the Name's premium. [*18] Finally, the Court refused to order a stay of execution.

Subsequently, Tuckey J. determined that there was no defence to the claim for the premiums based on the allegation that Lloyd's had failed to comply with Ontario securities law (The Society of Lloyd's v. Daly, reasons dated January 27, 1998). In doing so, he gave full effect to a legal opinion of James C. Baillie, Q.C., which had concluded that the actions of Lloyd's had contravened Ontario securities law because of the failure to file a prospectus, and thus, the obligations to Lloyd's would be unenforceable in Ontario. Tuckey J. nevertheless held that the enforcement of the contractual obligations in England was not against public policy, and thus, there was no defence available based on Ontario securities law. Subsequently, in March, 1998, summary judgment was awarded to Lloyd's for the various Equitas premium amounts. Tuckey J. granted a stay of execution until the determination of a leave to appeal application before the Court of Appeal, although he refused to order a general stay of execution.

Leave to appeal was then sought from the Court of Appeal. In lengthy reasons in Society of Lloyd's v. Fraser & Ors, [1998] [*19] E.W.J. No. 1045 the Court of Appeal denied leave to appeal from this judgment of Tuckey J. and others (reasons released July 31, 1998). The Court noted that there was no question here of enforcing a contract that would involve the infringement of an Ontario law, and there was no infringement of comity. The

Court noted that if the Canadian Names were correct and their contracts with Lloyd's were void and unenforceable, then so, too, would be the insurance contracts which they had entered, because their contracts' validity depended upon the validity of the underwriting membership with Lloyd's (at 37). Lord Hobhouse concluded that "no principle of comity or public policy would suffice to justify that result". In the course of these reasons, he also stated with respect to the procedure that had been adopted:

Trials are necessary in order to determine triable issues of fact. It is not the function of the Court on an O.14 hearing to make findings of fact. It is its function to consider whether the affidavits lodged by the defendants in response to the O.14 summons raise triable issues of fact which are capable in law of providing the defendant with a defence to the claim or part [*20] of it. (at 29) As a result of these decisions, the Equitas judgments are final in the United Kingdom as there is no further right to appeal. Lloyd's now seeks to enforce them in Ontario.

ANALYSIS

Issue 1 - The Proper Test On The Application

The appellants' first ground of appeal is that Swinton J. erred by failing to apply the test used on a Rule 21 motion, that is, to decide an issue of law on the basis that the facts relied on by the moving parties were true, and thereby held the appellants to a more onerous burden of proof of the facts. The appellants submit that the application judge did not state what test she was applying, but that her reasons suggest that she was not applying the Rule 21 procedure on the basis that she was constrained from doing so where the procedure used was an application rather than a motion within an action.

There is no merit to this ground of appeal. Swinton J. explained very clearly in her reasons that although this is an application, so that technically Rule 21 is not applicable, Rule 38.10 allows a judge hearing an application to grant or deny the relief sought or to order an issue to proceed to trial. She noted that there [*21] were no material facts in dispute with respect to the legal issues to be decided. There is no suggestion in the reasons that the application judge made any finding based on the appellants' failure to prove a fact. To the contrary, the agreed assumptions which formed the basis of the hearing assumed the facts to be most favourable to the appellants.

Issue 2 - Denial Of Natural Justice In The U.K.

The appellants' second ground of appeal is that the application judge erred in failing to find that there was a denial of natural justice in the procedure employed by the U.K. courts. The appellants refer to the fundamental right in Canada and in Ontario of a litigant before the courts to have a trial so as to have his or her case adjudicated on its merits. Their position is that they were denied that right in the U.K. proceedings which resulted in the judgments sought to be registered on the application. There are two branches to this submission. The first is that it was a denial of natural justice for the U.K. court to grant judgments against the appellants based on the Equitas premiums mandated under the R&R plan without allowing them to have their fraud claims against Lloyd's [*22] adjudicated first. The second is that on the Order 14 and 14A motions, Colman J. and Tuckey J. made certain findings of fact on disputed issues without a trial, which is contrary to our procedures under Rules 20 (summary judgment) and 21 (determination of an issue before trial), where facts in dispute require that the case proceed to trial.

Can the Court Refuse to Register Judgments on the Basis of a Denial of Natural Justice?

Article IV(1) of the Convention adopted by the Reciprocal Enforcement of Judgments (U.K.) Act lists the circumstances when the registering court must refuse to register a foreign judgment:

1. Registration of a judgment shall be refused or set aside if:

(a) the judgment has been satisfied;

(b) the judgment is not enforceable in the territory of origin;

(c) the original court is not regarded by the registering court as having jurisdiction;

(d) the judgment was obtained by fraud;

(e) enforcement of the judgment would be contrary to public policy in the territory of the registering court;

The Convention does not refer specifically to a denial of natural justice as a ground for refusal to register. [*23] This omission bears some consideration, although no issue was raised as to the authority of the Ontario registering court under the Act to consider a denial of natural justice as a separate ground to refuse registration.

The jurisprudence regarding the principles for enforcement of foreign judgments has developed at common law in the absence of any statutory framework
such as the Reciprocal Enforcement of Judgments (U.K.) Act, for example, between Canada and the United States. The decision of Henry J. in Four Embarcadero Center Venture v. Kalen (1988), 65 O.R. (2d) 551 (H.C.J.), involving a California default judgment, is the oftcited authority on the tests for enforcement of a foreign judgment by an action on the judgment in Ontario. The judgment sought to be enforced must be both final and unimpeachable. Henry J. set out five grounds upon which a foreign judgment could be impeached:

(a) the judgment is a nullity because the court did not have jurisdiction over the subject matter and the parties;

(b) the defendant was not a party to the foreign action;

(c) the judgment was procured by fraud on the court;

(d) there was a failure of procedural [*24] natural justice; and,

(e) to enforce the judgment would be contrary to public policy in Ontario.
In other words, at common law, a failure of procedural natural justice is a separate ground for non-enforcement from whether enforcement would be contrary to the public policy of the registering jurisdiction.

This raises the question whether the omission of denial of natural justice as a listed ground for non-registration under the Reciprocal Enforcement of Judgments (U.K.) Act was deliberate, or whether it was considered by the drafters and by the Legislature to be encompassed by the public policy ground; or, in any
event, whether it is open to the court when interpreting and applying Article IV(1)(e) of the Act, to consider enforcement of a judgment alleged to have been obtained by a denial of natural justice, in some aspect as contrary to the public policy of the enforcing jurisdiction.

Article IV(2)(a) specifically permits the law of the registering jurisdiction to provide for setting aside registration where "the judgment debtor, being the defendant in the original proceedings, either was not served with the process of the original court or did not receive notice of [*25] those proceedings in sufficient time to enable him to defend the proceedings and, in either case, did not appear." This section recognizes one aspect of a denial of procedural natural justice as a ground which any registering court's law may view as a basis to set aside registration of a foreign judgment. Section 1 lists other conditions for refusal to register, such as fraud, which are also encompassed by natural justice. On the basis of the maxim expressio unius est exclusio alterius, those Articles may suggest that it is only to the extent of the listed matters that a denial of procedural natural justice is to be considered as a basis for non-enforcement. Because the purpose and effect of the Act is the reciprocal enforcement of judgments between the U.K. and Canadian provinces, it may have been considered unnecessary to make any further reference to the possibility of a denial of procedural natural justice in judicial proceedings in those jurisdictions.

On the other hand, the public policy exemption language of the Reciprocal Enforcement of Judgments (U.K.) Act is similar to that of the International Commercial Arbitration Act, R.S.O. 1990, c. I-9, which adopts the [*26] [UNCITRAL] Model Law on [International] Commercial Arbitration. The commentary on the meaning of "public policy" in the Model Law, found in the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, June 3-21, 1985 (published in the Canada Gazette, Part I, Vol. 120, No. 40, October 4, 1986, Supplement at p. 3), states:

297 . . . It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at. [Emphasis added.] (p. 63) The issue of whether the concept of "public policy" includes examples of denial of natural justice not specifically listed elsewhere in Article IV, also relates to and informs the third

[*27] ground of appeal, which is whether enforcement of these judgments would be contrary to the public policy of Ontario. In that context, the appellants ask this court to consider a broader definition of "public policy" than the traditional concept involving moral issues, as it has been defined and applied in the context of enforcement of foreign judgments and other awards. Normally, a denial of procedural natural justice is not considered a moral issue.

Swinton J. commented that a failure of natural justice has been held to be an aspect of public policy and proceeded to deal with the appellants' submissions on that basis. Henry J. in Kalen, supra was prepared to acknowledge counsel's suggestion that a denial of procedural natural justice in obtaining the judgment may be an aspect of public policy. (p. 575)

It is not necessary in this case to finally decide whether a denial of natural justice, not specifically referred to in Article IV(1) and (2), is included within the public policy provision of the Reciprocal Enforcement of Judgments (U.K.) Act because, as discussed below, I have reached the conclusion that there was no denial of natural justice in the English [*28] proceedings which resulted in the judgments that Lloyd's is seeking to enforce in Ontario. However for the purpose of the analysis, I will proceed on the same basis as did Swinton J., that a denial of natural justice can be considered to be an aspect of public policy and therefore within the public policy ground for refusal to register under Article IV(1)(e).

Was there a Denial of Natural Justice in the U.K. Proceedings?

Sharpe J. noted in United States of America v. Ivey (1995), 26 O.R. (3d) 533 at 550 (Gen. Div.) aff'd (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 582 that the defence against enforcement of a foreign judgment based on a denial of natural justice exists in theory, although it is rarely applied in practice. In Canadian Conflict of Laws, 4th ed. (Toronto: Butterworths, 1997), J. G. Castel lists examples of what has not amounted to a denial of natural justice in the context of enforcement of a foreign judgment:

A foreign judgment can be impeached if the proceedings in which the judgment was obtained were contrary to natural justice. Proceedings are not regarded as having [*29] been contrary to natural justice merely because the foreign court admitted evidence which was inadmissible under Canadian law, or excluded evidence which was admissible under the forum's law, nor because of a mere procedural irregularity on the part of the foreign court, provided that the unsuccessful party was given an opportunity to present his or her case. . . . [Footnotes omitted.] (p. 287-8)

This is not surprising as natural justice is a very flexible concept, the basis of which is notice and an opportunity to be heard. Specific procedures vary not only from forum to forum, but at different courts and tribunals within a forum.

(i) Denial of Trial on the Merits

The appellants claim that natural justice was denied to them in the U.K. proceedings in two ways. The appellants' first argument is that the denial of natural justice in this case was more fundamental than any specific procedural failure or difference, because it prohibited the appellants from having a hearing on the fundamental issue they raised from the outset: that their entire investment was based on a fraud perpetrated on them, and therefore they are entitled to rescind that investment and not [*30] be bound by all of the obligations that have been imposed as a result of it. They forcefully submit that when it decided Ash, supra, had this court known that the appellants would not have their fraud claim heard before judgment enforcing their obligations was imposed, it would never have stayed the action in Ontario by holding that the United Kingdom and not Ontario was the forum conveniens for resolving disputes between the Ontario Names and Lloyd's.

It is true that the Ontario courts in 1992 could not have anticipated the course of this litigation in the U.K, or the measures ultimately taken to preserve the
Lloyd's insurance market, including the "pay now, sue later" rule which was successfully imposed on the Lloyd's Names by the Equitas arrangements and their enforcement by the U.K. courts. However, it cannot be said that had our courts known or considered this possibility, they would not have stayed the Ontario action.

In Ash, supra Carthy J.A. emphasized that both the exclusive English jurisdiction clauses as well as the connection with England were the factors that most influenced the choice of forum. He referred to the fact that the contracts [*31] were to be performed in England, that the alleged wrongful conduct was conduct of English

residents carrying out day to day functions under Lloyd's jurisdiction, and to an overall picture "of an overwhelming affinity to England." (p. 758). Any stay of proceedings in Ontario in favour of proceedings in a foreign jurisdiction is based on the assumption and confidence that such proceedings will be carried on in accordance with the principles of natural justice. This court is now being asked to decide whether the plaintiffs were denied fundamental natural justice in the U.K. proceedings.

In considering this issue, it must be recognized that the procedures which these appellants have had imposed on them are extraordinary. It is true that they have not had the opportunity to present their defence to the enforcement actions. The remedy of rescission that they sought was effectively removed. The issue for this court is, can it be said that what occurred in this context amounts to a denial of natural justice which would require this court to deny registration of the judgments obtained?

The appellants submit that the denial of the opportunity to present their defence is not just a denial of [*32] ordinary procedural fairness in both England and Ontario, but that such a procedure offends our notions of substantive justice and, they say, is therefore contrary to our public policy. The appellants rely on the decision of the English Court of Appeal in Adams v. Cape Industries plc, [1991] 1 All E.R. 929 (C.A.), where the court refused to enforce judgments of the Texas District Court awarding damages to plaintiffs for injury caused by asbestos dust. The defendant was the supplier of the asbestos. The basis for the English court's ruling was that the Texas court had awarded a global sum for damages for all plaintiffs based on a proposal by plaintiffs' counsel, while the amount to go to each plaintiff was to be determined by the plaintiffs' attorneys. The Court of Appeal held that the natural justice required for England to enforce foreign judgments was not limited to due notice and the opportunity to be heard, but included the English court's view of substantial justice. In that case, substantial justice required the Texas District Court judge to determine the quantum of damages for each plaintiff and not to delegate that assessment to the attorneys.

In reaching [*33] its conclusion the court stated:

. . . If the procedure adopted by a foreign court offends English notions of substantial justice, whether or not the procedure be in accordance with the procedural rules of the foreign court, I cannot see any good reason why the resulting judgment should be enforceable in England. . . . (p. 985) Whether one refers to a denial of natural justice as a procedural concept only, or one which may encompass a procedural irregularity that leads to a result that is contrary to our notions of substantive justice, the real issue is whether our courts are unable to sanction enforcement of judgments in Ontario when there has been fundamental unfairness in the proceedings resulting in the judgments.

Swinton J. listed the factors which led her to the conclusion that there was no denial of natural justice that would justify refusal to enforce the U.K. judgments. I agree with her conclusion. She based her conclusion on several factors. However, in my view, the factor which meets the major concern of the appellants, is that the U.K. courts gave full consideration to the fraud defence by assuming that the appellants would be able to prove the frauds they [*34] alleged. In other words, they took the defence
at its highest, but still held that it would not amount to a defence in law to prevent judgment going on Lloyd's Equitas premium claims. The appellants were not denied the opportunity to prove their case. It was taken as a given.

In The Society of Lloyd's v. Leighs, Lyon and Wilkinson, supra the Court of Appeal, in upholding the judgments of Colman J., reached the legal conclusion that there could be no rescission by the Names of their contracts with Lloyd's for fraudulent misrepresentation for two reasons. First, rescission would adversely affect third parties. In theory, this includes the policyholders whose policies are with those Names, although in practice, the Equitas fund would cover them. Recission would also adversely affect the Names who agreed to pay Equitas premiums, because they would have to cover the liabilities of the rescinding Names. Second, because as a matter of law in England, membership in Lloyd's is essential for Names to conduct the insurance business, "it is fundamentally incompatible with the business that has been carried on for Names to withdraw, retroactively, from membership of Lloyd's." (para. 38) The [*35] court concluded therefore, that restitutio in integrum was impossible. As a result, the remedy of recission would not be available for the frauds alleged by the plaintiffs, assuming they were proved. The plaintiffs' remedy could only be in damages.

The Court of Appeal also held that Clause 5.5 of the Equitas contract, which is the clause that prevents any set-off against the amount owing for premiums to Equitas as part of the R & R settlement, includes any set-off for the fraud claims made against Lloyd's. Again, accepting the fraud allegations as proved, the court proceeded to hold that the premiums were still owing because Clause 5.5 was not affected nor was its effect lessened.

The court also refused to exercise its discretion in the face of Clause 5.5, to issue a stay of execution pending determination of the counterclaim for fraud. This was an exercise of discretion which is similar to the discretion of our courts under Rule 27.09. This was the only issue where the court did not assume that the fraud had or could be proved. Under our rule, the merits of the counterclaim are a consideration which a court takes into account in the exercise of its discretion whether to grant [*36] a stay. However, the fact that the court did not appear to consider the merits of the fraud allegations in the course of exercising its discretion does not speak to a denial of natural justice. To grant a stay after deciding to give effect to the no set-off or "pay now, sue later" clause would have been anomalous and contradictory.
Having decided, in effect, that the merits of the fraud claim would not affect the enforceability of the clause, it was open to the court not to reintroduce
the merits of the fraud claim as a factor in the exercise of the court's discretion regarding a stay. If a meritorious fraud claim could not provide a defence to the enforceability of the clause, it could not provide a set-off to the claim based on that clause.

The appellants would have been satisfied had they been successful on any one of the three bases: by raising a viable defence to the summary judgment itself, by obtaining the right to set-off the amount of the fraud claim against the amount of the judgments, or by achieving a stay of the judgments pending determination of the fraud claim. However, the second two results flowed from the first. On the summary judgment issue itself, although the [*37] appellants did not have the opportunity to present their fraud defence and therefore their claim for rescission, the appellants were not deprived of the legal effect of a full hearing on the merits because the fraud was assumed to be proven. It cannot be said that they were deprived of natural justice in the circumstances.

The other factors which the application judge considered in reaching the conclusion that the enforcement of the judgments in Ontario would not be contrary to natural justice are:

(a) the Ontario Court of Appeal determined in Ash, supra that England was the proper forum for the resolution of all disputes between Lloyd's and the Names;

(b) the appellants had an opportunity to participate in and were represented by counsel throughout all of the English proceedings;

(c) the appellants participated in motions for directions regarding the process followed by which the Order 14 and 14A applications were managed and heard in the Commercial Court;

(d) they were able to raise all defences on which they sought to rely to resist the judgments;

(e) the appellants were not precluded from proceeding with their fraud actions in England [*38] but chose not to do so, nor did they participate in the test
case brought by Sir William Otho Jaffray to determine the "Threshold Fraud Point";

(f) the financial hardship caused by the "pay now, sue later" procedure forced on the appellants is not a sufficient reason to deny enforcement of the judgments; and,

(g) although an order requiring the posting of security for costs could have the effect of denying the appellants the ability to litigate the fraud claims in England, such orders are discretionary and no such order had yet been made. I agree that these factors assist the court in assessing the degree of procedural and substantive fairness that was accorded the appellants throughout the English proceedings leading to these judgments, in the context of a requirement of natural justice for enforcement of foreign judgments. However, in my view, the substantive complaint here is based on the "pay now, sue later" policy which was imposed on the appellants and which was upheld by the English courts. Had those courts not proceeded on the basis that the fraud claims, if proved, would not have provided a defence to the judgments because the remedy of rescission was not available, [*39] the other procedural safeguards may well not have overcome the failure to provide the appellants with an opportunity to present the fraud defence.

Swinton J. refers to two cases in the United States where similar arguments were made to the Illinois and New York courts that Lloyd's judgments for payment of Equitas premiums should not be enforced against Names living in those States: Society of Lloyd's v. Ashenden, unreported, Case No. 98C5335, U.S. Dist. Ct. (Ill.) (April 22, 1999) and Society of Lloyd's v. Grace, unreported, Index No. 604065/98 (N.Y.S.C.) (November 12, 1999), aff'd [2000] NY-QL 10604 (S.C. App. Div.). The courts in those cases allowed Lloyd's judgments to be

enforced by entering summary judgment on them. They held that any deficiency in the English procedures was not fatal because other remedies were available to the Names in England. I agree that the availability of other remedies is one factor which the court can weigh in deciding whether any procedural irregularity in obtaining the judgments is a basis for non enforcement. However in my view, in this case, it is the fact that in the Order 14 and 14A motions the fraud claim was assumed to be proved that [*40] allows the court to view the procedure in the English court as according sufficient basic natural justice to allow the judgments to be considered for registration and enforcement in Ontario.

(ii) Findings of Fact on the Motion without Holding a Trial

The appellants' second argument that they have been denied natural justice in the English court proceedings is based on the allegation that in the Order 14 and 14A summary judgment motions n2, the English courts made findings of fact on contested issues without a trial and that this is contrary to our procedures on summary judgment or motions on issues of law under Rules 20 and 24 of our Rules of Civil Procedures.

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n2 Application by plaintiff for summary judgment (O.14, r.1)

1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
. . . .

Manner in which application under rule 1 must be made (O.14, r.2)

2. (1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.
. . . .

Judgment for plaintiff (O.14, r.3)

3. (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on the claim or part as may be just having regard to the nature of the remedy or relief claimed.

(2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgments given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.
. . . .

Determination of Questions of Law or construction (O.14A, r.1)

14A/1 1.(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the actions, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either -

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination. . . .

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - [*41]

The appellants complain about the judgment of Colman J. In The Society of Lloyd's v. Wilkinson, supra at pp. 21 - 35 where he discusses restitutio in integrum. Colman J. concluded that the appellants could never get rescission of their contracts with Lloyd's because restitutio in integrum was at that point impossible. The basis of this conclusion was his finding that as members of Lloyd's, the appellants had ". . . enjoyed the benefits of Lloyd's administrative facilities . . ." including the ability to conduct the business of insurance. He went on to delineate what those administrative facilities were. They included Lloyd's Policy Signing Office, Lloyd's central accounting system, Lloyd's Underwriters Claims and Recoveries Office, Lloyd's Central Fund and the Lloyd's administrative control or supervision including underwriting and managing agents, syndicate auditors and brokers. The court concluded that the benefit of these facilities could not be returned to Lloyd's by the Names in order to effect restitutio in integrum, as it had been "irretrievably consumed" in the course of conducting the underwriting business.

Colman J. went on to analyze whether the membership [*42] fees paid over the years could be said to compensate for the benefits received such that by keeping the fees, Lloyd's would be compensated, so that restitutio would not be necessary. He considered the effect of rescission on the operation of the Equitas regime going forward, and concluded that there would be major problems.

The appellants assert that the court determined either without evidence or on contested evidence, the facts which underpinned its conclusions about the unavailability of rescission, the intent and meaning of the General Undertaking, the history and evolution of the R & R Plan, the authority to enter into the Equitas contract, and the waiver of a stay. The appellants say that these findings were made either without any evidence or by choosing from conflicting evidence and that to do so without a trial is a denial of natural justice. They submit that "on a plain reading of the judgments, it is apparent that there was a genuine issue for trial."

I cannot give effect to this submission. First, the appellants did not make any reference to the record to demonstrate which facts were contested in the record
before the English court. Nor did they refer to the record [*43] to demonstrate a lack of evidence. The specifics of which purely factual findings may have been in dispute is unclear. Second, there is clearly an overlap between the court's findings of fact and conclusions of law in the judgments. The appellants contest the conclusions of law rather than any particular factual finding.

The appellants also complain about a lack of evidentiary basis for Colman J.'s decision not to grant the stay of execution. Colman J. wrote in The Society of Lloyd's v. Wilkinson, supra:

Where an anti set-off clause is inserted in a contract, its purpose is to prevent one of the parties delaying payment of debts accruing due under the contract while cross-claims are investigated and determined. The insulation of the set-off or counterclaim does not have the purpose of achieving severance for its own sake, but merely as a means of achieving the speedy discharge of indebtedness. If that effect could be avoided by applying for a stay of execution in the face of such a clause its whole function would be subverted. (pp. 47-48) The appellants have not demonstrated, based on the record before Colman J., that these comments about an anti-set-off clause were [*44] made without any foundation.

The final reason to confirm the judgment below is that even if a trial on the fraud issue was ordered, the remedy of rescission was essentially unavailable. This was demonstrated in the argument in the English courts on the Security Act/public policy issue. Counsel for the Names asked for rescission from the English courts, but in argument counsel acknowledged that the Names were liable for their insurance underwriting. That concession speaks against rescission. In The Society of Lloyd's v. Daly, supra Tuckey J. labeled the Names' position as "an anomalous proposition contrary to comity and common sense". The Court of Appeal in The Society of Lloyd's v. Fraser, supra, made the same observation:

. . . the acceptance of this argument would mean that the insurance contracts entered into by Mr. Daly would

likewise be void and unenforceable, a consequence which for obvious reasons Mr. Daly disclaimed, because their validity under English law depended upon the validity of Mr. Daly's underwriting membership of Lloyd's. If he was not an underwriting member of Lloyd's he could not lawfully enter into any insurance contract, as an insurer, in [*45] England. No principle of comity or public policy would suffice to justify that result and, as we have said, it was one which Mr. Daly has implicitly recognised to be unacceptable. For all of the above reasons, I conclude that the appellants have not demonstrated a denial of natural justice in any of the English proceedings. Therefore the issue of denial of registration and enforcement on that basis does not arise.

Issue 3 - Public Policy

The third ground on which the appellants attack the registration of the U.K. judgments for enforcement in Ontario is that enforcement would be contrary to the public policy of Ontario. The appellants say that the underlying agreements which formed the basis of these judgments were illegal and unenforceable at the behest of Lloyd's because Lloyd's did not file a prospectus as required by s. 53(1) of the Ontario Securities Act.

That Lloyd's breached the Securities Act by not filing a prospectus before trading in securities with Ontario Names is an assumed fact for the purpose of the application and the appeal. Article IV(1)(e) of the Reciprocal Enforcement of Judgments (U.K.) Act provides that:

Registration of a judgment [*46] shall be refused or set aside if
. . . .

(e) enforcement of the judgment would be contrary to public policy in the territory of the registering court.

The appellants' submission is that where the respondent traded in securities in Ontario in breach of statutory requirements, so that had the respondent brought its actions in Ontario, it could not have succeeded, it must be contrary to the public policy of the province to enforce the judgments the respondent was able to obtain in the U.K.

Counsel for the appellants acknowledges the development of the jurisprudence in this area which provides in various formulations, that the basis of the judgment sought to be enforced must be contrary to essential justice or morality, or the most basic and fundamental values of the registering jurisdiction. Examples cited are fraud, bribery or other coercion, prostitution, and at one time (before this court's decision in Boardwalk Regency Corp. v. Maalouf (1992), 6 O.R. (3d) 737 (C.A.)) gambling. Counsel's argument is that the concept of what is contrary to our public policy must be viewed more broadly than on the narrow basis of purely moral issues, and that something [*47] as fundamental as the legislative policy behind the conditions imposed by the Securities Act for trading in securities to and by the public is a most important reflection of the public policy of this province.

The general approach of Canadian courts to the definition and application of public policy is discussed by Castel in Canadian Conflict of Laws, supra:

It is almost impossible to give a precise definition of public policy; nor can a general statement be made about its scope. Evidence of public policy can be found in the total body of the constitutional and statute law as well as the case law of the forum,
since it will reflect the local sense of justice and public welfare. The fact that the lex fori on the same point differs from the foreign law is not a sufficient ground for denying recognition to the foreign claim. Fundamental values must be at stake.

In the conflict of laws, public policy must connote more than local policy as regards internal affairs. It is true that internal and external public policies stem from the national policy of the forum but they differ in many material respects. Rules affecting
public policy and public morals [*48] in the internal legal sphere need not always have the same character in the external sphere. Also, there should be a difference of intensity in the application of the notion of public policy depending on whether the court is asked to recognize a foreign right or legal relationship, or to create or enforce one based on some foreign law. Public policy is relative and in conflict of laws cases it represents a national policy operating on the international level.

If foreign law is to be refused any effect on public policy grounds, it must violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the forum. . . .
. . . .

In the common law provinces of Canada very seldom has public policy been invoked in the courts with success, as this exception has been construed narrowly. . . . [Footnotes omitted.] (pp. 171-172) The leading case in Ontario on the meaning of "public policy" in this context is the decision of this court in Boardwalk Regency v. Maalouf, supra. In that case, the defendant had gambled on credit at the plaintiff's
casino in New Jersey and had written and dishonoured a cheque for [*49] $ 43,000 in payment of the debt. He then allowed default judgment to go against him in New Jersey. When the casino sought to enforce the judgment in Ontario, the defendant argued that it would be contrary to the public policy reflected in the Gaming
Act, R.S.O. 1980, c. 183, which made wagering contracts void, consideration for gaming illegal and contracts unenforceable. Carthy J.A. for the majority framed the issue as follows:

. . . The legal issue to be addressed is whether the language of the Gaming Act, apart from its direct impact on domestic contracts, is to be taken as an
expression by the legislature which bears the mantle of public policy to the point of making it offensive to participate in enforcement of the foreign judgment. It cannot be every statutory statement or prohibition which raises this defence or little would be left of the principle of comity underlying conflict of laws jurisprudence. (p. 742)

In considering this issue, Carthy J.A. preferred the narrow construction of public policy, quoting with approval the speech of Lord Atkin in Fender v. St
John-Mildmay, [1938] A.C. 1 (H.L.) at pp. 11-12, where he said that ". . . the doctrine [*50] [of public policy] should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds."

Carthy J.A. concluded that gambling under license could be legal in Ontario and was not the type of morally repugnant activity such as corruption of children that is tainted by immorality in a way which mandated refusal of enforcement. Lacourciere J.A. concurred with Carthy J.A., but added that because gambling was legal and regulated in New Jersey, it would not offend the Canadian general public to enforce a debt legally incurred in such a jurisdiction.

Arbour J. A. dissented. She expressed the view that public policy should not be viewed solely in moral terms. However, she was not prepared to resolve the morality debate concerning gambling because in her view, the case turned on the fact that the Criminal Code, R.S.C. 1985, c. C-46, prohibits keeping a common gaming house and the commercial gambling activities of the casino could not have been licensed and carried on legally in Ontario. She concluded:

. . . It would not be sound public policy, in my opinion, to permit [*51] recovery of a debt incurred outside Ontario under circumstances that would be criminal under the same circumstances in Ontario, and yet to deny recovery for gambling debts legally incurred here. To decide otherwise, in my opinion, is to force Ontario public policy, as expressed in part in the Criminal Code, to yield to foreign law. (p. 758) The issue of "public policy" tends to arise in two conflicts of laws contexts: one is the enforcement of foreign judgments; the other is the application of foreign law in an action tried in a Canadian court where the foreign law may be contrary to the public policy of the Canadian forum.

Canadian courts in other cases where either the foreign law or the judgment to be enforced has conflicted with a statute of the forum, have come to the same conclusion and result as did the majority in Boardwalk Regency Corp. v. Maalouf, supra. In Sigurdson v. Farrow (1981), 121 D.L.R. (3d) 183 (Alta. Q.B.) an Alberta statute prohibited actions on the covenant of a mortgage. The mortgaged land was in British Columbia and the mortgage was made in Ontario. After default, an action on the covenant was brought in Alberta. The [*52] court considered that both the land and the mortgage were outside the province and concluded that the policy of the Alberta statute did not engage ". . . a principle of morality or justice which commands almost universal recognition . . .", citing from Dicey and Morris, The Conflict of Laws,
9th ed. (1973).

Sigurdson v. Farrow, supra followed Canadian Acceptance Corporation Ltd. v. Matte (1957), 9 D.L.R. (2d) 304 (Sask. C.A.) where Saskatchewan law prohibited action on a conditional sale deficiency while the Manitoba law (where the contract was made) did not, and Nat'l Surety Co. v. Larsen, [1929] 4 D.L.R. 918 (B.C.C.A.) where the B.C. court was prepared to apply the law of the State of Washington, which allowed indemnification of loss on bail bond, while British Columbia law prohibited it. Both the offence and the bail proceedings had taken place in Washington. The court concluded again that there was no violation of an essential principle of justice

nor would permitting the appellant to prosecute the action be ". . . inherently repugnant to moral and public interests . . .". (p. 943)

Block Brothers Realty Ltd. v. Mollard (1981), 122 D.L.R. (3d) 323 [*53] (B.C.C.A.) was another action in British Columbia to enforce a contract made and performed in another jurisdiction, in that case, Alberta. The contract was for real estate commission, however, the land that was sold was in British Columbia. British Columbia law required that real estate agents be licenced in British Columbia as a precondition to an action to recover commission. After concluding that Alberta rather than British Columbia substantive law applied, the court considered whether recognizing the contract would be contrary to the public policy of British Columbia in light of the statutory prohibition. Again, the court concluded that this was not an issue which engaged an essential public or moral interest. In other words, this particular public policy of the province, as declared in the statute, reflected a legislative choice for the ordering of affairs involving real estate transactions and agents, but did not engage the fundamental values of British Columbia society.

A somewhat more tentative approach was taken by Brennan J. in Kidron v. Grean (1996), 48 O.R. 775 (Gen. Div.), where the plaintiff was seeking enforcement of a California judgment which included [*54] an award of $ 15 million for emotional distress. The issue was whether such an award was contrary to the public policy of Ontario, on the basis that it conflicted with the Supreme Court of Canada trilogy of decisions which placed a cap on awards for pain and suffering and loss of amenities in certain circumstances. n3 Brennan J. refused to grant summary judgment on the California judgment, but instead ordered a trial on the public policy issue. Brennan J.'s concern was similar to that of the English Court of Appeal in Adams v. Cape Industries plc, supra referred to earlier, where the court refused to give effect to the Texas court's damages award on the basis that it conflicted with both procedural and substantive justice under English law. Whether the approach taken in these cases, based as it appears to be on a conflict with the local substantive law per se, is consistent with the weight of authority on the proper approach to public policy, need not be decided in this case.

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n3 Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229; Thornton v. Prince George School District No. 57, [1978] 2 S.C.R. 267; Arnold v. Teno, [1978] 2 S.C.R. 287.

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Kidron v. Grean, supra can be usefully contrasted with the decision of the British Columbia Court of Appeal in Old North State Brewing Co. v. Newlands Services Inc. (1998), 23 C.P.C. (4th) 217 (B.C.C.A.) where the plaintiff was seeking enforcement of a North Carolina judgment. The contract provided that the governing law was British Columbia and that the parties would attorn to the British Columbia courts. However, the plaintiff brought the action in North Carolina where the defendant did not attorn and the North Carolina court applied its own law including an award of treble damages. The British Columbia court granted the enforcement proceedings, holding that the jurisdiction clause was not exclusive, that the North Carolina court could apply its own law where it had no evidence that British Columbia law was different, and that an award of treble damages was not contrary to ". . . the essential or moral interests of British Columbia . . ." The latter conclusion was based on the analysis that because a federal statute gave the Attorney General of Canada the power to declare treble damage awards unenforceable in certain anti-trust cases, it follows that in other [*56] circumstances, such awards are enforceable.

The public policy exemption was also denied in the enforcement action of United States of America v. Ivey, supra. The plaintiffs sought summary judgment in their action in Ontario to enforce two Michigan judgments obtained under the United States CERCLA environmental protection regime. In granting the enforcement judgment in Ontario, the court rejected the submission that enforcement would be contrary to our public policy just because the provisions of the CERCLA regime were more onerous than under the Ontario Environmental Protection Act, R.S.O. 1990, c. C-43.

The review of the case law confirms that the public policy exemption is narrow, when considered both in the context of applying foreign law in actions brought in Canadian jurisdictions, as well as in enforcing foreign judgments in Canadian provinces, and therefore, it has rarely been applied. This is consistent with the trend expressed by the Supreme Court of Canada in both Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 and in Tolofson v. Jensen, [1994] 3 S.C.R. 1022; the two cases which have set the modern [*57] rule for both interprovincial recognition of judgments of other provinces, and for the choice of law of the lex loci delicti for automobile accidents which have multi-provincial connections. That trend is to emphasize the concept of

comity among nations and particularly among provinces of this country when addressing the issue of enforcement of judgments and choice of law. In both cases, the role of the public policy concept was left, in effect, as a safety valve to prevent anomalies. In Morguard Investments Ltd. v. De Savoye, supra, La Forest J. said that to alleviate possible unfairness to a defendant sued out of his or her home province, the enforcing court has the discretion not to recognize a judgment in conflict with the public policy of that province n4. In Tolofson v. Jensen, supra he noted that if a wrong would not be actionable in the forum had it been committed there, that may be a factor to be weighed both when determining forum non conveniens and when deciding whether entertaining the action would be contrary to the public policy of the forum.

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n4 The majority in Beals v. Saldanha, [2001] O.J. No. 2586 (C.A.) confirmed that the narrow application of the public policy defence as set out in Boardwalk Regency v. Maaloufy, supra, is still the correct approach and it is consistent with Morguard Investment, Ltd. v. De Savoye, infra.

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Having confirmed that the trend of the jurisprudence is that the public policy exemption is to be narrowly construed and rarely applied, the issue in this case is whether to enforce judgments when the party seeking enforcement acknowledged breaching the Ontario Securities Act prospectus requirement. Does this breach have the necessary moral opprobrium traditionally required for the application of the public policy exemption? Or, as counsel submitted, should the concept of our public policy be broadened to encompass a breach of this nature?

The legislative objective of the Securities Act has recently been reiterated by this court in Quebec (Sa Majestie du Chef) v. Ontario Securities Commission (1992), 10 O.R. (3d) 577 at 590 (C.A.) where the court stated:

. . . the simple legislative objective involved in this appeal is regulation of the operation of capital markets in Ontario for the protection of all who use them. This includes the protection of persons and corporations dealing in Ontario markets whether or not they are resident in Ontario. The fundamental importance of the prospectus in our jurisdiction for the orderly, fair and reliable [*59] operation of our financial markets can be safely said to be undisputed. As Henry J. stated in Jones v. F. H. Deacon Hodgson Inc. (1986), 56 O.R. (2d) 540 at 546 (H.C.):

There can be no question but that the filing of a prospectus and its acceptance by the commission is fundamental to the protection of the investing public who are contemplating purchase of the shares. Furthermore, the same can be said of similar securities legislation in other jurisdictions. This has been amply demonstrated by the judicial struggle in the numerous actions in the United States (and elsewhere) involving Lloyd's and the Names of the particular jurisdictions to reconcile the importance of securities regulation laws to the operation of local financial markets, with the international aspect of the Lloyd's contractual arrangements with its Names from jurisdictions around the world n5.

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n5 e.g. Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2nd Cir. 1993); Allen v. Lloyd's of London 94 F.3d 923 (4th Cir. 1996); Haynsworth v. The Corporation, 121 F.3d 956 (5th Cir. 1997); Richards v.
Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998); Society of Lloyd's v. Grace, supra, and The Society of Lloyd's v. Ashenden, supra.

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Because the primacy of the protection of our capital markets and the role that the full, true and plain disclosure obligations and the anti-fraud measures contained in securities regulation legislation plays in the scheme for that protection is basic to the well-being of our economy and our society, it is, in my view, beyond dispute that taken on its own and in isolation from other factors, to condone a breach of those obligations would be contrary to the public policy of Ontario. However, to view the disclosure obligation provisions of the Securities Act, such as the prospectus requirement, as akin to a moral imperative may be to stretch the concepts unnecessarily. Public policy has been universally described as "fundamental values" and "essential principles of justice". In my view, it is appropriate at this stage in the development of our society, to characterize the protection of our capital markets and of the public who invest in and depend on the confident and consistent operation of those markets as such a fundamental value.

That does not mean, however, that in this case enforcement of the U.K. judgment must be denied as contrary to public policy. The issue of whether enforcement [*61] of a U.K. judgment must be refused as contrary to public policy in Ontario does not merely involve a definitional approach to the meaning of public policy but requires a consideration of all the dimensions of the case which carry implications for public policy. To determine whether enforcement of the particular judgment would be contrary to the public policy of Ontario, the court must consider the historical and factual context of the proceedings which led to the granting of the judgment, and where there are competing public policy imperatives, whether overall, registration would be contrary to public policy.

The major aspect of the factual context of these judgments is readily distinguishable from most of the recent cases. The distinction in this case is the agreement of the parties before Swinton J. to assume the fact that had Lloyd's sought to enforce the obligations incurred by the Names in their investments with Lloyd's in Ontario, because no prospectus was delivered or filed, such an action would not have been entertained by an Ontario court: Jones v. F. H. Deacon Hodgson Inc., supra. n6

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n6 This puts the appellants' case at its highest. It is not certain what the result would be have been, had Lloyd's sued to enforce the Equitas premium obligation in Ontario, in light of the passage of time since the original contracts were made and the issues relied on by the English courts in their findings that restitutio in integrum was not possible, so that the remedy of rescission was not available, as well as the fact that many third parties including policyholders and other Names would be adversely affected by such a result: Sidmay Ltd. v. Wehttam Investments Ltd. (1967), 61 D.L.R. (2d) 358 (O.C.A.); Royal Bank of Canada v. Grobman (1977), 83 D.L.R. (3d) 415 (O.H.C.).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [*62]

In many of the cases where courts have declined to apply public policy, the obligation arose outside the jurisdiction and in conformity with local law, such as in Boardwalk Regency Corp. v. Maalouf, supra, Sigurdson v. Farrow, supra, and Nat'l Surety Co. v. Larsen, supra. As Carthy J. A. stated in Boardwalk Regency Corp. v. Maalouf, supra, if we were to treat every Ontario statutory enactment as an expression of our public policy for this purpose, little would be left of the principle of judicial comity. However, in this case, it is agreed or assumed that the basis for the judgment is an illegal trade in securities which actually did occur in Ontario.

Therefore, the public policy may not turn exclusively on repugnance for the fundamental values represented by the underlying legal basis for the judgment, but on whether our courts are prepared to enforce a foreign judgment when an action on the same cause, had it been litigated in Ontario, would not have been entertained.

In my view, both on the basis of the assumed fact that there was a breach of the Securities Act making the underlying transaction prima facie [*63] unenforceable in an action brought in Ontario at the suit of Lloyd's, and because I am satisfied that such non-compliance with our Securities Act does involve what in today's society are viewed as fundamental and essential values, the enforcement of such a judgment in many circumstances would be prohibited under the Reciprocal Enforcement of Judgments (U.K.) Act as contrary to the public policy of Ontario.

However, in this case there are two factors which, when weighed against the breach of the Securities Act, satisfy me that in spite of that breach, it would not be contrary to public policy to register and enforce these judgments in Ontario:

1. The Decision in Ash v. Lloyd's Corp., supra.

In Ash v. Lloyd's Corp., supra this court affirmed the decision of the General Division that the proper forum for determination of issues arising out of the membership in Lloyd's by the Ontario Names was not Ontario but England.

The plaintiffs had brought an action for a declaration that their agreements with Lloyd's were void ab initio on two grounds. One, that they were induced by fraud,
and two, that the agreements were made in contravention [*64] of the Securities Act. They also sought

rescission of the agreements on those bases. The defendant sought a stay on the basis of the exclusive jurisdiction clause in the plaintiffs' agreements with Lloyd's, and alternatively pleaded forum non conveniens.

McKeown J. first determined that even if fraud was proven, the agreements containing the forum selection clause would not be abrogated to the extent of the choice of forum clause. In the face of the plaintiffs' agreement that the English courts would have exclusive jurisdiction over any disputes they might have with Lloyd's, the plaintiffs had the onus of showing "strong cause" why Ontario would be a more appropriate forum than England. McKeown J. found three factors which favoured Ontario: (a) the plaintiffs were only 70 out of 35,000 Names, 81% of whom were located in England; (b) the plaintiffs' cause of action was under an Ontario statute, the Securities Act; and (c) the law of Ontario was possibly more favourable than that of England in respect of fraud. However, he identified 20 points of contact with England including the fact that the documentation for all of the Names was the same and included both the exclusive [*65] jurisdiction and choice of law clauses and the relief sought would necessarily impact the others; the experts, documents, witnesses, the Central Fund which is for the protection of all policyholders, the Names Association and other persons and entities associated with the issues were all in England; and the plaintiffs filed no evidence that they would be disadvantaged by proceeding in England.

In the latter regard, McKeown J. proceeded on the basis that the English courts would apply Ontario law if it were determined to be applicable. He also noted that the plaintiffs faced a number of problems with their Securities Act claim, including the fact that they had benefited from their Lloyd's membership over many years, so that there was an issue as to whether the contracts could be voided in those circumstances. (This was of course, ultimately the basis for the plaintiffs' failure to obtain rescission, even for fraud.) McKeown J. also commented at p. 252 that: "There is no reason to believe that the English courts would not apply the Securities Act." In light of his earlier reference to English courts applying Ontario law only if it were determined to be applicable, I read this [*66] statement as subject to the same qualification.

McKeown J. concluded that a permanent stay of the Ontario action was appropriate. His reasons were fully endorsed by the Court of Appeal.

It is clear from the detailed reasons of McKeown J., adopted by the Court of Appeal, that both he and this court were well aware of the nature of the plaintiffs' claims of both fraud and breach of the Securities Act, and of the potential consequences of staying the Ontario actions in favour of litigation of all issues in England. They also adverted specifically to the possibility that the English courts would not find Ontario law to be the proper law of the contracts.

In other words, the outcome that eventually resulted was contemplated as a possible outcome when the Ontario courts effectively sent the case to proceed in England. The decision of this court that the Lloyd's cases were to be heard in England and not in Ontario was effectively a decision that if the English courts determined that Ontario law was not the proper law of the contracts, the judgments that flowed from that decision would not be contrary to our public policy. Had this court been of the view that compliance with the [*67] Securities Act was so basic to the public policy of Ontario that a judgment which did not give effect to the Act could never be registered and enforced, no matter what the circumstances, then it would have treated that as a factor which, in effect, trumped all other factors, including the exclusive jurisdiction clause and the connections to England, and it would not have stayed the action. To now conclude that the English judgments are unenforceable in Ontario as contrary to the public policy of this jurisdiction, would undermine the credibility of the earlier decisions of our courts and of our judicial system.

The issue of the breach of the Ontario Securities Act was one of the two central issues brought before McKeown J. in Ash v. Lloyd's Corp., supra in 1991. This court was prepared to have that issue addressed by the English courts and to accept the result. In effect, the Ontario courts determined that in this case, it would not be contrary to the public policy of Ontario to enforce a judgment which may have condoned a breach of the Securities Act.

I note that this was also the conclusion reached by the U.S. District Court in Lloyd's v. Ashenden, [*68] supra a similar enforcement action in respect of the Equitas premium judgments obtained by Lloyd's. In that case, as in this one, the Illinois Names first sought to have their claims for rescission of the Lloyd's agreements tried in Illinois, but their actions were stayed on the basis of the choice of forum clause. One of the issues which the court had considered but rejected in the earlier case, was that granting the stay and upholding the choice of forum clause was contrary to Illinois public policy because it would offend the Illinois Securities Act. When the Names sought to raise the same public policy argument again in the enforcement context, the court held that that argument was foreclosed.

2. Principles of International Comity

The Lloyd's contracts are international contracts, involving an English insurance/investment system where the participant members or Names are located
worldwide. All Names entered into the same agreements wherein they agreed to litigate their disputes in England under English law. Names are solicited in their home jurisdictions, many of which have securities legislation with provisions similar in purpose to the Ontario Securities Act [*69] in terms of providing full and honest disclosure of all material information which investors need in order to make informed investment decisions, and thereby to protect the investing public.

The U.S. courts which have faced the same public policy argument made by the appellants have almost uniformly rejected it on the basis of international comity principles. For example, in Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998) the Names sought an order invalidating the choice of forum clause in their agreements with Lloyd's. The majority of the court rejected the Names' public policy argument on the basis that the contracts with Lloyd's were international, the forum selection clause in international contracts is very important and should be applied even if that means that foreign law will be applied, and English law and English courts would provide the Names with sufficient protection. A similar result was reached in Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993); Riley v. Kingsley Underwriting Agencies, 969 F.2d 953 (10th Cir. 1992); and Lipcon v. Lloyd's, [1998] CA11-QL 402 (11th Cir.).

The public policy [*70] concerns have also been rejected in other Canadian provinces where these issues have been raised and considered: see Morrison v. Society of Lloyd's (2000), 224 N.B.R. (2d) 1 (N.B.C.A.) leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 137) and Crockett v. Society of Lloyd's (2000), 189 Nfld. & P.E.I.R. 129 (P.E.I. S.C. (T.D.)). In Crockett v. Society of Lloyd's, supra the P.E.I. court was already aware that the English courts were not applying the securities legislation of the Names' home jurisdictions.

All of the U.S. cases referred to rely on the United States Supreme Court decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) which set out the importance of upholding forum selection clauses, even if to do so may result in conflict with relevant local statutes. In Lipcon v. Lloyd's, supra the court dealt with the concerns raised by the contrary position with these references:

Although we do not deny that there is some force to appellants' argument that the anti-waiver provisions [of the securities legislation] preclude application of the Bremen test, we believe that to invalidate the choice provisions for that reason [*71] in effect would be to conclude that "the reach of the United States securities laws [is] unbounded" Richards, and to ignore the Supreme Court's caveat that "we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts," Bremen. . . . [Citations omitted.] (para. 40) The Supreme Court of Canada has recently expressed a similar sentiment with respect to the reach of provincial securities legislation. In Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), 2001 S.C.C. 37, the issue was the Commission's discretion to exercise its authority to sanction under s. 127(1) of the Securities Act. In its conclusion that the decision of the Commission not to do so be upheld, the court
stated:

It is true that the OSC placed significant emphasis onthe transactional connection factor. However, it wasentitled to do so in order to avoid using theopen-ended nature of s. 127 powers as a means topolice too broadly out of province transactions.
Capital markets and securities transactions arebecoming increasingly international: [*72] see Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494, 2000 SCC 21, at paras. 27-28. There are a myriad of overlapping, regulatory jurisdictions governing securities transactions. Under s. 2.1, para. 5 of the Act, one of the fundamental principles that the OSC has to consider is that "the integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes." A transaction that is contrary to the policy of the Ontario Securities Act may be acceptable under another regulatory regime. Thus, the OSC's insistence on a more clear and direct connection with Ontario in this case reflects a sound and responsible approach to long-arm regulation and the potential for conflict amongst the different regulatory regimes that govern the capital markets in the global economy. (para. 62)
This observation by the Supreme Court is consistent with the direction taken by the U.S. courts and other Canadian courts on this same issue and with the principles of international comity which now play an increasingly important role in the approach of the courts to issues [*73] involving international commerce. For example, in Hunt v. T & N plc, [1993] 4 S.C.R. 289 at p. 321 La Forest J. reiterated the modern approach:

A central idea in that judgment [Morguard Investments Ltd. v. De Savoye] was comity. But as I stated, at p. 1098, "I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience" that underlie them. In my view, the old common law rules relating to recognition and enforcement were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe. All of the courts that have recognized the authority of the English courts to hear and decide all of the
Lloyd's litigation and have decided to enforce the resulting judgments, have been satisfied that to grant rescission to some Names, when the insurance policies which they have underwritten remain outstanding, would create a situation of economic chaos as well as unfairness. [*74] Tuckey J. in The Society of Lloyd's v. Daly, supra referred to such an outcome as an "anomoly", which it clearly would be. Furthermore, because the Names would retain their obligations under those policies, they would benefit from the Equitas scheme. Therefore, the result reached by the English courts, that the Names must pursue their damages remedy for fraud after paying their premiums and participating in the scheme necessary to retain the viability of this very important worldwide insurance market, is a sensible one. In that context, our public policy of enforcing the rules of comity where justice, necessity and convenience all favour enforcement, outweighs the concerns we might otherwise have where there has been a breach of the prospectus requirement of our Securities Act.

A similar conclusion was reached by many of the U.S. courts which considered the same issues between Lloyd's and the Names. For example, in Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996), a case which upheld the choice of forum clause, the court noted:

Finally, significant United States and foreign interests would be adversely affected if we were to insist that Lloyd's [*75] insurance underwriting syndicates comply with United States disclosure requirements. Such a ruling would place at risk billions of dollars of insurance coverage for United States citizens because American Names could demand rescission on the ground that their syndicates, even though they include citizens of various countries, did not comply with United States securities registration and disclosure requirements. Insurance commissioners from several states have described the potential mass confusion and damage to the domestic insurance market that such a ruling would cause. (para. 30)

This was also a major factor emphasized by Swinton J. in her decision that enforcement of the Lloyd's judgments would not be contrary to public policy within the meaning of the Reciprocal Enforcement of Judgments (U.K.) Act. For all of these reasons I would affirm her decision.

Issue 4 - Satisfaction Of The Judgments

On the original application, the appellants' third argument was that some of the U.K. judgments should not be enforced in Ontario because they had been satisfied in whole or in part. That argument was dismissed. Although it is listed as a ground of appeal in the Notice [*76] of Appeal, it was effectively abandoned as the issue was not pursued in the appellants' factum or in their oral submissions.

The issue arose originally as a result of the successful actions for negligence by some of the Names against their Managing and Member Agents. The right to the proceeds of the judgments in those actions was claimed by Lloyd's in its capacity as trustee of the Lloyd's Premium Trust Fund. The House of Lords eventually determined that Lloyd's was entitled to the proceeds on that basis. Once Lloyd's had obtained judgment against the Names for the Equitas premiums, the Names who had monies from judgments against the agents sought to have those monies applied against the Equitas premium judgments rather than against the Premium Trust Fund or Central Fund. At the time of the application before and the decision of Swinton J., the funds were still being held in solicitors' accounts and had not yet been turned over to Lloyd's, although they were transferred shortly thereafter. Lloyd's then continued to hold the funds without applying them either to the Central Fund or the Equitas judgments until November 10, 2000, after receipt of the decision in The Society of Lloyd's [*77] v. Jaffray, [2000] E.W.J. No. 5731 (Q.B.D.), the Threshold Fraud test case. At that time, Lloyd's elected to apply the funds to the Equitas judgments. As a result, seven of the appellants have now had their judgments satisfied in full, while 19 others have had the amounts of the judgments against them reduced.

On the basis of the developments since the judgment of Swinton J. and since the appeal hearing, the appellants now seek an order allowing the appeal in respect of the seven, setting aside the judgments and striking the award of costs against them. With respect to the other 19, the appellants ask that the appeal be allowed or alternatively that the amounts of the judgments registered against them be reduced.

The respondent opposes this application on the ground that the satisfaction of judgment issue was effectively abandoned on appeal, and that delivery of a satisfaction piece is a full and adequate remedy in the circumstances.

The appellants' response is that credit ratings will be affected by the existence of valid judgments and further that it leaves the seven subject to the order for costs which was made joint and several by Swinton J. against the group of appellants. [*78]

No evidence was filed in respect of the post-hearing developments, only written argument.

Although the affected appellants no doubt view this development as another example of high-handed conduct on the part of Lloyd's in its dealings with the Canadian Names, from a legal perspective, the situation is not different than it would have been had the U.K. judgments been satisfied from some other source following the judgment of the court below and before the finalization of the appeal.

Swinton J.'s decision on the satisfaction of judgment issue was based on the following findings:

(1) Both parties agreed that as of the date of the hearing, the proceeds of the judgments against the agents were still being held in escrow and had not been paid to Lloyd's;

(2) For the purpose of the application, the Names had no legal right to demand that the escrow monies be used to satisfy their Equitas premium obligations, because that issue could only be determined by the English courts;

(3) Because the monies had not been paid to Lloyd's, the highest position was that they were monies which were or might become available to pay the judgments; and

(4) Therefore the judgments had [*79] not been satisfied in whole or in part.
These findings were not challenged on the appeal and they must therefore stand. As a result, it would not be appropriate for this court to consider any subsequent change or to give such change a nunc pro tunc effect.

CONCLUSION

On November 3, 2000, Cresswell J. delivered a lengthy and detailed judgment in The Society of Lloyd's v. Jaffray, supra, on the Threshold Fraud Point. Cresswell J. was sympathetic to the plight of the Names and noted in his conclusion that:

External Names (whether they accepted R & R or not) were the innocent victims of the failings and incompetence [of underwriters, managing agents, members' agents, and others]. Many Names have suffered enormously in financial and personal terms. (para. 1452)

However, he found in favour of Lloyd's and against the Names on the Threshold Fraud Point which he described as follows:

. . . whether Lloyd's made misrepresentations which it knew to be untrue and/or as to which it was reckless whether they were true or false, and whether such misrepresentations were communicated to the Names and if so, when? (para. 22).
These allegations of [*80] fraud, which have now been dismissed, formed the basis of all the litigation between the Names and Lloyd's. In particular, the claim for rescission and the resultant position taken in this proceeding that the judgments obtained by Lloyd's should not be enforced, was based on the appellants' claim that they did not have the opportunity to litigate the allegations of fraud.

Subject to any appeals from this judgment, the result in The Society of Lloyd's v. Jaffray, supra, unacceptable though it may be to the Names, brings to a close the basis of their dispute with Lloyd's over their original dealings with Lloyd's through which they became Members and Names.

Cresswell J. concludes with a recommendation for an independent review panel to consider individually the cases of those Names who did not accept the R & R Plan to try to reach a fair settlement with each of them.

RESULT

In the result I would dismiss the appeal. Costs will follow the event unless counsel wish to bring to the attention of the court any basis for a different disposition.

"K. Feldman J.A."

"I agree John Laskin J.A."

"I agree S.T. Goudge J.A."