EXHIBIT C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V

Civil Action No 3-03-0032
Judge Nixon
Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

"MDF1"

This is the Exhibit marked "MDF1" referred to in the Affidavit of MICHAEL DAVID FREEMAN sworn this first day of July 2003.

Before Me,

A Solicitor/ Commissioner for Oaths

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V

Civil Action No 3-03-0032
Judge Nixon
Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

"MDF2"

This is the Exhibit marked "MDF2" referred to in the Affidavit of MICHAEL DAVID FREEMAN sworn this first day of July 2003.

Before Me,

A Solicitor/ Commissioner for Oaths

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V

Civil Action No 3-03-0032
Judge Nixon
Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

"MDF3"

This is the Exhibit marked "MDF3" referred to in the Affidavit of MICHAEL DAVID FREEMAN sworn this first day of July 2003.

Before Me,

A Solicitor/ Commissioner for Oaths

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V

Civil Action No 3-03-0032
Judge Nixon
Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

"MDF4"

This is the Exhibit marked "MDF4" referred to in the Affidavit of **MICHAEL DAVID FREEMAN** sworn this first day of July 2003.

Before Me,

A Solicitor/ Commissioner for Oaths

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V

Civil Action No 3-03-0032
Judge Nixon
Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

"MDF5"

This is the Exhibit marked "MDF5" referred to in the Affidavit of **MICHAEL DAVID FREEMAN** sworn this first day of July 2003.

Before Me,

A Solicitor/ Commissioner for Oaths

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V
Civil Action No 3-03-0032

Judge Nixon

Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

AFFIDAVIT OF MICHAEL DAVID FREEMAN

Grower Freeman
Solicitors
Ivor House
25-26 Ivor Place
London NW1 6HR
Tel: 020 7723 3040
Fax: 020 7723 9015
Ref: MDF/NLG/6808.2GRIP

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V

Civil Action No 3-03-0032
Judge Nixon
Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

AFFIDAVIT OF MICHAEL DAVID FREEMAN

I, **MICHAEL DAVID FREEMAN**, of Ivor House, 25-26 Ivor Place, London NW1 6HR, based upon my personal knowledge, hereby declare as follows:

1. I am a member of Grower Freeman, a firm of solicitors located at Ivor House, 25-26 Ivor Place, London NW1 6HR, and am a solicitor duly licensed to practise in England and Wales. I first became licensed to practise as a solicitor in March of 1961.

2. I make this Affidavit at the request of John McQuiston II, counsel for the Tennessee Names. I have been advised that it will be submitted as part of the response to be filed by the Tennessee Names to Lloyd's motion for Summary Judgment.

3. Since 1961, my experience in the law has been mostly concentrated in commercial litigation. My formative years, as an articled clerk from 1956 to 1961, and then from 1961 to 1968, were with the City of London firm, Middleton Lewis, which firm later merged with the firm of Lawrence Graham. Middleton Lewis acted as solicitors for a number of Lloyd's Members' and Managing Agents, and for many Lloyd's Names. I became involved with Lloyd's again in 1990 when the Names on the Oakeley Vaughan Syndicates retained me in connection with their claims against Lloyd's for breach of implied duty of care. I have also been engaged in all aspects of the litigation with the Society of Lloyd's ("Lloyd's") in the Commercial Court and the Court of Appeal in London which culminated in Summary Judgment being confirmed by the Court of Appeal on 31 July 1998 against approximately 650 Names. This Action was known as The Society of Lloyd's v. Fraser & Others ("Fraser").

4. I am familiar with the Lloyd's Acts 1871-1982 ("the Lloyd's Acts") which are private Acts of Parliament duly passed in England under English Law. The last of the Lloyd's Acts was the Lloyd's Act 1982 under which Lloyd's was given full self-regulatory status. In particular, Section 6 provides the Council of Lloyd's with the authority to execute, amend, or revoke any Byelaw "as from time to time seem requisite or expedient" for the execution of the Lloyd's Acts 1871 to 1982. Under Section 14, the exclusion of liabilities of Lloyd's is expressly stated not to apply only if: "the act or omission complained of was done or omitted to be done in bad faith"; or was that of an employee and occurred carrying out "routine or clerical duties."

5. Pursuant to the Lloyd's Act 1982, all Byelaws passed by the Council of Lloyd's, provided they are not ultra vires, have the force of English Law insofar as they purport to regulate the affairs of Lloyd's and its Members. The Byelaws include those which enable Lloyd's to: (a) standardise and regulate the form of

Members' and Managing Agency Agreements; and (b) impose a substitute Members' Agent on Names, if the Name's chosen Agent is disqualified or refuses to obey Lloyd's instructions.

6. Another Byelaw is No. 22 of 1995 which came into effect on December 6, 1995, and is known as the Reconstruction and Renewal Byelaw ("the Byelaw"). It was passed when Lloyd's became aware that, if the radical steps set out in the Byelaw were not implemented, Lloyd's would be unable to continue as an insurance market as a result of: (a) the calamitous losses which the Market had sustained; (b) the High Court judgments which had been obtained against most of Lloyd's Members' Agents and many of its Managing Agents; and (c) the sheer weight of pending and imminent further litigation against such bodies and against Lloyd's.

7. Part of Byelaw No. 22 involved "the Equitas Scheme," and within that scheme, a provision for the Equitas Reinsurance Contract ("Contract"). I am not aware that any of the approximately 2,500 Members of Lloyd's who I represented prior to August 31, 1996, ever saw or were made aware of the detailed provisions of the Contract. To the best of my knowledge, the first time that any U.S. Names knew of the Contract was when they received a letter before action dated on or about October 3, 1996, from Dibb Lupton Alsop ("DLA"), the solicitors acting for Lloyd's. This letter claimed from U.S. Names their Equitas Premium pursuant to the Contract – which the letter stated had been entered into by them and was dated September 3, 1996.

8. Because I had not seen the Contract, I immediately requested a copy from DLA. I received such a copy on or about October 10, 1996. I saw that the Contract contained what has become known as the "pay now – sue later" provision at clause 5.5. The Contract was purportedly signed on behalf of U.S. Names by a wholly owned subsidiary of Lloyd's in the capacity of a substitute

Members' Agent that had been imposed on the Names. This was directly contrary to the instructions given by many Names to their Members' Agents. Many of the Members' Agents declined to sign the Contract because they considered that were they to do so it would involve a conflict of interest. Their role was then abrogated by Lloyd's pursuant to its powers under the Byelaws.

9. Clause 5.5 of the Contract states as follows:

> "Each Name shall be obliged to and shall pay his Name's Premium in all respects free and clear from any set-off, counterclaim or other deduction on any account whatsoever including in each case, without prejudice to the generality of the foregoing, in respect of any claim against ERL ["Equitas Reinsurance Limited"], the Substitute Agent, any Managing Agent, his Members' Agent, Lloyd's or any other person whatsoever and:
>
> (a) in connection with any proceedings which may be brought to enforce the Name's obligation to pay his Name's Premium, the Name hereby waives any claim to any stay of execution and consents to the immediate enforcement of any judgment obtained;
>
> (b) the Name shall not be entitled to issue proceedings and no cause of action shall arise or accrue in connection with his obligation to pay his Name's Premium unless the liability for his name's premium has been discharged in full; and
>
> (c) the Name shall not seek injunctive or any other relief for the purpose, or which would have the result, of preventing ERL, or any assignee of ERL, from enforcing the Name's obligation to pay his Name's Premium."

10. Clause 5.10 of the Contract provides that: ". . . the records of and calculations performed by the CSU shall be conclusive evidence as between the Name and ERL in the absence of any manifest error."

11. In a series of decisions on preliminary issues, English Courts concluded that the "pay now – sue later" clause included in the Equitas Reinsurance Contract was effective against all Names, even assuming they could prove fraud by Lloyd's. *Society of Lloyd's v. Leighs Lyon & Wilkinson* (unpublished) (Q. B. Feb. 20, 1997) (all Names' non-fraud defenses barred); *Society of Lloyd's v. Wilkinson & Others* (unpublished) (Q. B. Apr. 23, 1997) (all Names' fraud defenses also barred – even assuming Lloyd's committed fraud). Appeals from these decisions were dismissed. *Society of Lloyd's v. Leighs Lyon and Wilkinson* (unpublished) (Court of Appeals, July 31, 1997).

12. The English Courts also rejected the Names' challenges to the "conclusive evidence" provision. *Society of Lloyd's v. Fraser & Others*, (unpublished March 4, 1998). On July 31, 1998, the Court of Appeal rejected the Names' application for leave to appeal the Fraser decision. *Society of Lloyd's v. Fraser & Others* (unpublished) (July 31, 1998).

13. The Court also rejected the attempt by some United States, Canadian and Australian Names to raise matters relating to the violation of the securities laws of their respective countries and/or states. The rejection was the consequence of the provision in the General Undertaking which all Names were required to enter into with Lloyd's as a condition of underwriting from January 1 1987 which provided for all matters regarding the underwriting of Names to be decided in the English courts under English law.

14. Were it not for the provisions of Clause 5.5 of the Contract, the Defendants would have been able to plead by way of Defense the fraudulent

misrepresentations which at the time of these decisions the Defendants claimed had been made to them by the Plaintiffs. They would also have been able to counterclaim or apply to set-off against the amount claimed by the Plaintiffs the amount which they claimed to have suffered by way of damages as a result of the said fraudulent misrepresentations. The Defense and the Counterclaim and/or the Set-Off would have been heard at the same time and as part of the Claim of the Plaintiffs.

15. Similarly, the "conclusive evidence" provision prevented Names from examining or even seeing the underlying documentation which gave rise to the calculations of the Equitas premium claimed from them. As a result, it was not possible for Names to know whether there was any manifest error within the underlying documentation.

16. The provision in clause 5.5 of the contract that the Defendants should "pay now" and then sue later is simply not practical. The costs of instituting proceedings against Lloyd's even as part of a grouping were substantial and for many of those Names who paid their Equitas Premium under protest there were insufficient funds remaining to enable them to participate in litigation against Lloyd's. This was especially the case where the banks or insurance companies who had guaranteed the Names' underwriting obligations to Lloyd's were seeking payment from the Names under their counter indemnities following the draw down by Lloyd's or which had issued letters of credit to Lloyd's by way of security against all the guarantees and letters of credit many of which counter indemnities were supported by charges over Names' homes by way of collateral security.

17. In four leading decisions, English courts did rule that Lloyd's Members' Agents, Managing Agents, and Auditors were guilty of negligence with respect to their Names. *Henderson, et al. v. Merett Syndicates, Ltd., et al.*, Nos. 1992/1946,

etc., (Q. B. Division, Commercial Court, October 31, 1995); , Q. B. Division, Commercial Court (unpublished April 2, 1996); *Deany, et al. v. Gooda Walker Ltd., et al.* [1996] LRLR 183; *Arbuthnott, et al. v. Feltrim Underwriting Agencies, Ltd.*, [1996] LRLR 135. Although these cases awarded damages to Names aggregating approximately £1 billion, Lloyd's successfully decreed that all of the damages must be credited to the Premiums Trust Fund of each Name of which Funds Lloyd's was a Trustee. However, a substantial proportion of the damages awarded remained unpaid because the Errors & Omissions insurers of the agents and auditors, most of which insurance was itself placed within syndicates in the Lloyd's market, was wholly insufficient to meet the claims.

18. Lloyd's treatment of the Names' litigation recoveries was upheld by the Court of Appeal pursuant to Lloyd's broad powers of self-regulation granted to it by the Lloyd's Act of 1982. Napier v. Kershaw [1997] LRLR 1.

19. A number of Names against whom Summary Judgment was given in Fraser, but not the Tennessee Names, issued discrete and separate Counterclaims against Lloyd's in which they effectively became the Plaintiffs because of the provisions of Clause 5.5 of the contract. The Action is known as *The Society of Lloyd's v. Sir William Jaffray and Others ("Jaffray")*.

20. Pursuant to Directions Orders issued by the Commercial Court in London in which *Jaffray* was to be tried, Lloyd's was instructed to give notice to all non-accepting Names that they had the right to become parties to *Jaffray* and if they did not they would be bound by the decisions of the Court in any event. Those who wished to consider joining *Jaffray* were not entitled to access to the disclosure produced by Lloyd's in the Action prior to joining. Although they would have been able to apply to become litigants in person they would not have been entitled to examine any witnesses at the trial but will have been able to submit a written statement. There is no right to a jury in England in such

trials. All those joining *Jaffray* would have become liable for a several share of Lloyd's costs in the event that *Jaffray* was unsuccessful. Lloyd's claims that its costs up to the end of the *Jaffray* trial were approximately £20 million.

21. The issue at trial in *Jaffray* was confined to what was known as the "Threshold Fraud." The reason for such confinement as ordered by Mr Justice Colman on 30th June 1998 was because the Courts had ruled that there were no defences to Lloyd's claims as set out in paragraph 11 above. Until the Human Rights Act 1956 was adopted as part of English Law on October 2nd 2000 as referred to in paragraph 25 below, there could be no cause of action against Lloyd's other than one based on fraud because of the immunity provisions in section 14.3 of the Lloyd's Act 1982 as referred to in paragraph 33 below. Therefore, the only issue to be decided by the Court in *"Jaffray"* was whether Lloyd's made any misrepresentations which they knew to be untrue and/or as to which they were reckless as to whether they were true or false. Judgment was given against the Counterclaimants at first instance by Mr. Justice Cresswell in November 2000. Mr. Justice Cresswell held that Lloyd's did not make any representations to Counterclaimants on which they were entitled to rely.

22. A full Court of Appeal heard the Appeal of the Counterclaimants from this Judgment over a period of 13 days ending on March 27, 2001, and delivered its Judgment on July 26, 2001. The Court of Appeal unanimously held that there was a representation by Lloyd's that a rigorous system of auditing was in place which involved the making of a reasonable estimate of outstanding liabilities, including unknown and unnoted losses. The Court further held that these representations continued throughout the period 1981-1988, and that the representations were untrue during the whole of that period. However, the Court held that the Courterclaimants had failed to discharge the heavy burden of proof upon them that Lloyd's did not believe the representations to be true

or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue.

23. For the reasons referred to in paragraph 21 above, *Jaffray* did not involve any other claims under English Law. Thus, no consideration was given to what I understand to be the doctrine in the United States of fraudulent omission, nor was any consideration given to negligent misrepresentation or any statutory cause of action such as any violation of the United Kingdom laws relating to securities. In addition, no consideration was given to any foreign legal doctrine or laws by virtue of the forum selection/choice of law provision in the General Undertaking referred to in paragraph 13 above..

24. The doctrines of fraudulent concealment and/or fraudulent non-disclosure are not recognized under English Law.

25. As a result of the Judgment of the Court of Appeal referred to in paragraph 22 many of the Counterclaimants in *Jaffray* sought Permission to Amend their Counterclaims to plead negligent misrepresentation. Section 14 (3) of the Lloyd's Act 1982 precludes any such claim against Lloyd's unless the negligent misrepresentation was made in bad faith, that is to say that the misrepresentation was fraudulent under English law. On October 2, 2000 the Human Rights Act 1956 was adopted as part of English domestic law. The Counterclaimants contended that Section 14 (3) operates as an impediment to their access to Court to try their claim that the misrepresentation found by the Court of Appeal was made negligently and is therefore prohibited under Article 6 (1). Mr Justice Cooke handed down Judgment on May 23rd 2003 and held that the Counterclaimants were attempting to invoke Article 6 (1) of the Human Rights Act retrospectively (which analysis the Counterclaimants reject) and thus all claims by those who became members of Lloyd's after July 23rd 1982, which date the Court held was the operative date of the Lloyd's Act

1982, were prohibited from relying on negligent misrepresentation. In addition, the Judge identified numerous hurdles for those who joined before the Lloyd's Act to overcome before he would give Permission to anyone to Amend their Counterclaims.

26. The Counterclaimants have now lodged a Notice with the Court of Appeal seeking the Permission of the Court of Appeal to appeal against the Judgment of Mr Justice Cooke.

27. It is in the context of all that I have said in the previous paragraphs that I now deal specifically with the matters raised by the Tennessee Defendants in their First Affirmative Defense.

28. I first refer to the "Proposed Findings of Fact and Conclusions of Law" (the "FFC") filed by Lloyd's in West Shell v Sturge/Lloyd's on December 21st 1993 which I understand were based upon the submissions made to the Court in that Action.

29. Paragraph 7 on page 9 of the FFC states as follows:-

> "Defendants have demonstrated that the Names have potential claims and remedies against BOTH Lloyd's and Sturge in the English fora and under the English law chosen by Plaintiffs' contracts eg Affidavit of John Lewis Powell. Mr Powell's Affidavit makes it clear that Plaintiffs may pursue causes of action against Defendants for the tort of fraudulent misrepresentation, breach of contract, negligence, breach of fiduciary duty and innocent misrepresentation." [my emphasis]

30. The FFC makes no reference to section 14.3 of the Lloyd's Act 1982 although Mr Powell was clearly aware of it as will be seen from paragraph 8 on page 6 of his Affidavit dated 3rd December 1993. This Affidavit of Mr Powell together

with its exhibited Affidavit of Adrian Walter Hamilton, are exhibited to this my Affidavit as "MDF1". It is to Section 14 (3) that I refer in paragraph 25 above.

31. What is said in paragraph 7b of the FFC is only accurate, as regards the Defendant Members Agent, Sturge. However, it is wholly inaccurate insofar as it relates to the Defendant, Lloyd's. In paragraph 6 of the Affidavit of Mr Powell he refers to the case of *Ashmore and Others v Corporation of Lloyd's (No.2)* in which I represented the Plaintiffs. A copy of the Judgment of Mr Justice Gatehouse delivered in or about May 1992 in that Action is exhibited as "MDF2" to this my Affidavit. I particularly refer to the analysis of Mr Justice Gatehouse at pages. 633 and 634 of the Judgment from which it will be seen that the Court rejected the arguments of the Plaintiff and held that Lloyd's had immunity from suit under Section 14(3) of The Lloyd's Act 1982 unless the act or omission complained of was - "done or omitted to be done in bad faith ...". Under English law "bad faith" is analogous to fraud in the Civil sense of that word. In this connection I refer again to paragraph 25 above.

32. It was because of the decision in *Ashmore v Lloyd's* that it was necessary for the Counterclaimants in *Jaffray* to plead that the representations made by Lloyd's were made fraudulently as referred to in paragraphs 21 and 22 above. However, when the Counterclaimants sought to amend their Counterclaims to plead that the misrepresentations found by the Court of Appeal in *Jaffray* were made negligently they were met, so far successfully, with the plea from Lloyd's of immunity under Section 14 (3) of the Lloyd's Act as referred to in paragraph 25.

33. I now refer to paragraph 8 of the Affidavit of Mr Powell and I emphasise again that the Affidavit was deposed to after the decision in *Ashmore v Lloyd's*. Mr Powell states that Section 14:-

"does not preclude Lloyd's from incurring liability to such a member altogether nor does it preclude such a member obtaining relief or a remedy other than damages on the basis of such liability. Thus it does not preclude the grant of an injunction, a declaration, rescission or restitutionary relief against Lloyd's."

Unfortunately for the Counterclaimants what Mr Powell says is nonsense. At this moment most of the Counterclaimants are facing Bankruptcy Petitions and indeed the first Hearing of Lloyd's attempt to bring the Counterclaimants to bankruptcy before their Applications to the Court of appeal for Permission to Appeal against the Judgment of Mr Justice Cooke took place as recently as 4th June 2003. Although the Counterclaimants will continue to press the Court to accept that the immunity of Lloyd's under Section 14(3) of the Lloyd's Act does not preclude the Counterclaimants seeking a stay on the enforcement of the Judgments by virtue of their claims for negligent misrepresentation or for any other reason or for some form of declaration that Lloyd's should not be entitled to enforce such Judgments, all attempts to do so hitherto have been rebuffed by the Courts.

34. I also refer to paragraph 9 of the Affidavit of Mr Powell and to paragraphs 21 and 22 on page 17 of the Affidavit of Adrian Walter Hamilton which forms part of my Exhibit "MDF1". In paragraph 9 Mr Powell, a very senior member of the English Bar, refers to rescission being a remedy under English Law for misrepresentation whether innocent, negligent or fraudulent. So it is. However, as Mr Powell must have known, it is not open to members of Lloyd's to rescind their contracts with Lloyd's as represented by the form of General Undertaking referred to in paragraph 13 above because of the existence of third party rights. The third parties are of course the insureds who are insured under each Lloyd's policy of insurance which policy is underwritten by the individual members of Lloyd's who are members of the insuring syndicates. An attempt was made by the Names in February 1997 in the *Society of Lloyd's v Leighs, Lyon & Wilkinson* in the action referred to in paragraph 11 above, to

claim that they were entitled to rescission of their contracts with Lloyd's. The attempt was robustly dismissed by Mr Justice Colman and the Court of Appeal upheld him on 31st July 1997.

35. At pages 36/37 of the Brief of Lloyd's in *West Shell -v- Sturge and The Society of Lloyd's* a copy of which I exhibit as "MDF 3" of this my Affidavit, Lloyd's repeats the erroneous and misleading exposition by Mr Powell of the Law of England relating to the matters which were before the Court.

36. I have been provided by Mr McQuiston with a copy of the Sixth Circuit Court of Appeals' decision in *Shell v Sturge and The Society of Lloyd's 55 F.3d 1227 (6th Cir.1995)*,. It is apparent from the references in that opinion to the decision of the Seventh Circuit Court of Appeals in *Bonny v The Society of Lloyd's 3 F.3d 156 (7th Cir. 1993)* that the Sixth Circuit relied heavily on the prior decision of the Seventh Circuit Court of Appeals in Bonny. Mr McQuiston has provided me with a copy of the Affidavit of Mr Powell dated 11th October 1991 in support of the position taken by The Society of Lloyd's and Others in defending the complaint of Mr & Mrs Bonny. Unsurprisingly paragraph 7 of this Affidavit sets out in 5 sub-paragraphs the same miss-statements of the Law of England insofar as it relates to the contract between the Names and Lloyd's represented by the General Undertaking as are contained in his Affidavit of 3rd December 1993 in the matter of *West Shell -v- Sturge and The Society of Lloyd's* and upon which I have commented in the previous paragraphs.

37. I have been provided by Mr McQuiston with a copy of the decision in *Bonny v The Society of Lloyd's 3 F.3d 156 (7th Cir. 1993)*. It is apparent from the Seventh Circuit Court of Appeals' opinion at page 161 that it relied heavily on the opinion of English law provided to it by Lloyd's via the Affidavit of Mr Powell dated 18th October 1991, as being a definitive statement of the remedies

available to Mr & Mrs Bonny in the English courts. The Seventh Circuit Court of Appeals was therefore seriously misled.

38. In the brief of Lloyd's in *West Shell v Sturge/Lloyd's* at page 37 Lloyd's states that members of Lloyd's have statutory causes of actions under English Law against Lloyd's and Sturge under Section 47 of the Financial Services Act 1986. However, in footnote 17 on the same page Lloyd's states:-

> "Section 42 of this Act exempts the Society of Lloyd's and underwriting Agents at Lloyd's from application of the statute; however, the secretary of the state is empowered to remove that exemption."

Whilst it may in theory be right that the Secretary of State had overweening powers, they would not be exercisable at the behest of individual members of Lloyd's and I know of no instance where there has been any example of the Secretary of State intervening. Indeed, the contrary is the case. The Secretary of State has been the most intrepid supporter of everything that concerns Lloyd's. I should also make it clear that membership of Lloyd's was not, and is not, considered in England to be an "investment" in the sense of, for example, a share quoted or to be quoted on the Stock Exchange. Specific and rigorous rules of disclosure of all material information apply to such investments. It has always been my understanding that Lloyd's has strongly resisted the notion that membership is an investment within the context of United Kingdom Securities Laws.

39. I hasten to emphasise that I have no expertise with regard to Federal or Tennessee securities laws other than what I may have picked up in the course of the Lloyd's litigation. However, from the standpoint of this exercise they are wholly irrelevant. The reason that I say this is because the forum selection/ choice of law clause in the General Undertaking has been held by the Court to be determinative of all aspects of the law relating to underwriting at Lloyd's. In

this respect I refer to the *Fraser* proceedings before Mr Justice Tuckey in February/ March 1998. These were the proceedings in which most of the non-accepting Lloyd's members including those resident in the United States were Defendants and in which Lloyd's sought summary judgment against them on the basis of clauses 5.5 and 5.10 of the Equitas Contract. I attempted to put forward evidence relating to the breaches of United States securities laws in relation to investments. I did the same for Australian Names and very detailed evidence was put in on behalf of Canadian Names regarding the breaches of their securities laws. Mr Justice Tuckey held that foreign securities laws were not relevant to his decision because he was deciding the matter under English law and the Court of Appeal upheld that decision in July 1998. I have referred briefly to this aspect of the Lloyd's litigation in paragraph 13 above when dealing with the background.

40. I exhibit as "MDF4" to this my Affidavit a copy of the Judgment of the Court of Appeal dated 10th November 1994 in the linked cases of *The Society of Lloyd's v Clementson and The Society of Lloyd's v Mason* in which I represented Mr Mason. The Court unanimously held that Lloyd's owed no duty of care or indeed any other duty to its Members. It was accepted that there is no express duty on Lloyd's in the General Undertaking which is the only contract between Lloyd's and its Members. However, it was argued that, given that Names placed the whole of their financial resources "down to their last cufflink" into the hands of the Market that was regulated by Lloyd's, business efficacy required that a duty of care, at the lowest, must be implied into the contract. The Court of Appeal rejected this argument on the basis that the Market functioned quite well without any such term being necessarily implied and any such duty rested with the Agents.

41. In the Affidavit of Mr Powell ("exhibit MDF1"), in the Brief submitted by Lloyd's to the Sixth Circuit Court of Appeals, and therefore unsurprisingly in the dedision of the Sixth Circuit Court of Appeals in the case of *Shell v Sturge*, there is a blurring of the legal position between the Names and their Members/Managing Agents on the one hand, and the Names and Lloyd's on the other, and this blurring flows right the way through the decision as set out in the Sixth Circuit's opinion in *Shell v Sturge*. The Agents most certainly owed duties to the members and these are spelled out in the Agency contracts. In addition, a duty to take reasonable care would most certainly have been implied into such contracts. When the extent of the catastrophe at Lloyd's surfaced in the early 1990s there was a proliferation of Action Groups formed by members of numerous syndicates to bring the equivalent of "Class" Actions against Managing Agents; Members Agents, Brokers and Auditors. It was as a result of the huge Judgments against some of these entities in 1994/1995 that forced Lloyd's into the Reconstruction and Renewal Settlement for otherwise, as Lloyd's freely admitted, the Market would simply have collapsed under the weight of the litigation.

42. Although, as the Courts held in the cases that were decided before the Settlement took over and would have held in all the cases which were waiting in the wings, that the Members Agents, Managing Agents, Underwriters, Brokers and Auditors had been negligent and were liable to the members, the Judgments were of no use to the Names to set off against the Claims of Lloyd's in respect of all the underwriting losses and irrespective of the actual or anticipated claims for damages against the Agents. First, because of the inaptly named "Pay Now - Sue Later" provisions in the Agents Agreement which barred set-off of any kind against all sums demanded by the Agents in respect of the actual and projected underwriting liabilities. Secondly because the insurance cover of the Agents et al (other than direct claims against the

Auditors) was hopelessly inadequate and in any event was incestuously covered within the Market by other Names such that on many occasions the Names were in reality suing themselves. Thirdly, once the incompetent conduct of the Members Agents and the negligent underwriting of many of the Managing Agents were exposed, there was a general collapse of Agencies. Many went into liquidation, amalgamated and re-amalgamated and then re-re-amalgamated whilst others ceased trading. Out of the approximately 163 Members Agents at the time of Mr Powell's Affidavit, there now remain but three.

43. By way of example, the Chairman of Lloyd's in 1992 was David Coleridge. He was also head of the largest Agency Grouping, the Sturge Agency, the Defendant in West Shell and which was the largest recruiter of Names in the United States. Apart from the Sturge Members Agency, the Sturge Managing Agency managed some of the worst performing syndicates. To my personal knowledge, Mr Coleridge was still recruiting at the Association of Lloyd's Members conference in Boston in 1993 at a time when the syndicates managed by his Agency were doomed.

44. At page 12 of Lloyd's Brief in *Shell v Sturge* it is stated that the Courts in Bonny, Roby and Riley concluded that - "English Law requires disclosure ... ". The suggestion that, under English law, Lloyd's is required to disclose any documents or information to its Members in the context of their underwriting activities is simply wrong. As I understand the position there is a fundamental difference between the law of misrepresentation in most States in the United States and the law in England. Under English law there is no requirement for one party to disclose any matter to the other party unless enquiry is made no matter what may be the state of knowledge or lack of knowledge of either party

and however detrimental to the interests of one party the knowledge held by the other party may be.

45. Finally I refer to the decision given by the Sixth Circuit Court of Appeals in ***Shell v. Sturge*** which is exhibited as 'MDF5'. In that case the Sixth Circuit Court of Appeals stated [at 55 F.3d 1231]:

> "The Seventh and Tenth Circuits examined English law and concluded that the Names would be able to adequately pursue their claims in England.
>
> We agree that plaintiffs have remedies which they can pursue in England. Plaintiffs seek rescission of their contracts under Ohio Rev.Code § 1707.43. The uncontroverted affidavit of Barrister John Lewis Powell shows that '[o]ne of the remedies under English law for misrepresentation (whether innocent, negligent or fraudulent) is rescission' and that a plaintiff 'may also be entitled to an indemnity against liabilities incurred.' Powell's affidavit also shows that plaintiffs can bring claims against defendants based on the tort of deceit, breach of contract, negligence, and breach of fiduciary duty. Although the Lloyd's Act of 1982 provides Lloyd's some immunity from damages, it does not preclude Names from obtaining injunctive, declaratory, rescissionary or restitutionary relief or preclude Names from damages where Lloyd's has acted in bad faith." *See* Bonny, 3 F.3d at 161-62.
>
> "Furthermore, Section 47 of England's Financial Services Act of 1986 provides a cause of action for any misleading statement or practice made for the purpose of inducing involvement in an investment agreement." Bonny, 3 F.3d at 161.

It is clear from the above quotation and the opinion as a whole that the Sixth Circuit relied heavily on the Affidavit of Mr. Powell. However, the language which the Sixth Circuit quoted above from Mr. Powell is a totally erroneous statement of the law, for the reasons I have discussed in this Affidavit. The court's conclusions concerning Section 47 of the Financial Services Act of 1986 are in error for the reasons I have stated in Paragraph 38 of this Affidavit. I do not accept that the members of Lloyd's had any rights under Section 47.

Sworn before me at

This first day of July 2003

.....

A SOLICITOR/ COMMISSIONER FOR OATHS

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V

Civil Action No 3-03-0032
Judge Nixon
Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

"MDF1"

This is the Exhibit marked "MDF1" referred to in the Affidavit of **MICHAEL DAVID FREEMAN** sworn this first day of July 2003.

Before Me,

A Solicitor/ Commissioner for Oaths

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE SOCIETY OF LLOYD'S,
Plaintiff,

V

Civil Action No 3-03-0032
Judge Nixon
Judge Griffin

BEN P SHIELDS, KATHERINE HARWOOD GOOCH, MARGARET WOOD JONES, and MARGARET W. NICHOL,
Defendants.

"MDF2"

This is the Exhibit marked "MDF2" referred to in the Affidavit of **MICHAEL DAVID FREEMAN** sworn this first day of July 2003.

Before Me,

A Solicitor/ Commissioner for Oaths